Supreme Court, U. S.
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No. 79 1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Certiorari Filed January 21, 1980
Certiorari Granted April 14, 1980

JOINT APPENDIX
VOLUME I

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April 13, 1977—Reply of Crow Tribe to Counterclaims of State of Montana.

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May 4, 1978—Memorandum and Order Granting Defendants Conditional Motion to Amend and Also Granting Plaintiff's and Crow Tribe's Motions to Strike.

May 25, 1978—Order Denying Plaintiff's and Crow Tribe's Motions for Summary Judgment.

June 5, 1978—Answers to Interrogatories by Crow Tribe.

June 19, 1978—Defendants' Addendum to Pre-Trial Order.

June 20, 1978—Motion to Amend by Plaintiff Crow Tribe.

June 20, 1978—Pre-Trial Order.

June 20, 1978—Plaintiff's Motion to Amend Complaint.

June 21, 1978—Order Granting Motions to Amend.

June 21, 1978—Trial Brief of Crow Tribe.

July 31, 1978—The District Court's Opinion.

July 31, 1978—Crow Tribe's Motion for Stay of Judgement and Motion for Injunction Pending Appeal.

August 1, 1978—Plaintiff's Motion for Stay.

August 1, 1978—Judgment.

August 1, 1978—Order Staying Judgment for 30 days.

August 2, 1978—Notice of Appeal by Crow Tribe.

August 14, 1978—Notice of Appeal by Plaintiff.

June 12, 1979—Opinion of Court of Appeals.

September 20, 1979—Denial of Rehearing and Modification of Opinion.

October 25, 1979—Judgment of Court of Appeals.

UNITED STATES' RESPONSE TO DEFENDANTS' FIRST COMBINED INTERROGATORIES, REQUESTS FOR PRODUCTION, AND REQUESTS FOR ADMISSIONS

(Record or Appeal, pp. 609, 612, 613, 615, 616, 620, 621 & 622)

* * *

21. Do you deny that that portion of Article II of the Treaty of May 7, 1868, 15 Stat. 649, quoted in paragraph 11 of the second cause of action has been abrogated in light of the geographical diminishment of the Crow Indian Reservation since 1868 and the intrustion, incursions and settlement of over 31 percent of the land area within the claimed present exterior boundaries of the Crow Indian Reservation by non-Indians? Answer: Yes, the United States contends that the Crow Tribe and the Congress must consent to any entry upon the reservation.

* * *

28. Do you have any documents, correspondence, memoranda, legal opinions (prepared by others than your counsel in this case), any opinions by attorneys general, any opinions by counsel or solicitors representing the Department of Interior, the Bureau of Indian Affairs, the Department of War, or any of their predecessors with regard to the ownership of any of the following:

(a) The bed and banks of the Big Horn River;

(b) The bed and banks of other streams and rivers within the exterior boundaries of the Crow Indian Reservation or within the boundaries of the original Crow Indian-claimed lands;

(c) Riparian rights owned or possessed by owners of land bordering on any portion of the Big Horn River or other rivers within the Crow

Indian Reservation or what were formerly claimed as Crow-claimed lands;

(d) Ownership of water rights within the Crow Indian Reservation by Indians or non-Indians;

(e) Water rights in the Big Horn River by Indians and/or non-Indains;

(f) Rights of navigation possessed by Indians and non-Indians and riparian owners and the general public with regard to the Big Horn River and other streams and rivers within the Crow Indian Reservation or, prior thereto, Crow tribal-claimed lands?

If so, please describe each and every such document, memorandum, or opinion so the same may be subjuect to a request for production. Consider this as a request for production of the described materials pursuant to the request set forth in the foregoing interrogatory. Answer: The United States objects to this request on the following grounds. As to subsections (a) and (b), there is no genuine dispute as to the ownership of the bed and bank of the river in light of *United States* v. *Finch* which confirmed title to the bed and bank in the United States for the benefit of the tribe. As to non-navigable streams, the United States is not claiming title to those lands and, hence, there is no issue in this case to which the interrogatory is directed. Subsections (c), (d), and (e) relate to water rights which are not in issue in this case and, hence, the request is irrelevant; the rights to the use of water of the Big Horn River are the subject of other litigation and, hence, discovery on this issue is proper only in those cases. F.R.Civ.P. 26(b)(1). Sub-section (c) is overly broad and puts an impossible burden on the United States to identify such documents. Subsection (f) is irrlevant because the United States and the tribe do not dispute that

non-Indians have the right to free navigation of the Big Horn River and, hence, there is no issue on the right of navigation on the Big Horn River in this case.

* * *

37. Do you admit that the Defendants have the right of free navigation over the waters of the Big Horn River? If not, in what way is this right restricted? State precisely and in detail the factual basis upon which you rely in stating that the Defendants do not own or possess any rights of navigation over such waters. Answer: Yes, the United States admits that the defendants have the right of free navigation within the reservation.

* * *

40. Do the Defendants, their guests, invitees, and/or licensees have the right, without the consent of the U.S. or the Crow Tribe, to moor or dock a boat on the bank of the Big Horn River in front of the property described in Defendants' first affirmative defense, paragraph 1? State precisely and in detail the factual basis upon which your answer is predicated. Answers: This issue was decided in *Confederated Tribes* v. *Namen*, and that case controls such rights.

41. In alleging ownership of the bed and banks of the Big Horn River, do you contend that the Defendants have no right to erect any kind of structure or building in front of the Defendants' property described in their answer, paragraph 1, first affirmative defense, without the consent of the U.S. or the Crow Tribe, below high-water mark of said river? State precisely and in detail the factual basis upon which you predicate your answer. Answer: See response 40.

42. Does the Plaintiff, the U.S., contend that the

U.S. and/or the Tribe can exclude all persons, who have not first obtained the consent of the U.S. or the Crow Tribe, from the use of any of the waters of the Big Horn River within the claimed boundaries of the Crow Indian Reservation? If so, state precisely and in detail the factual basis upon which you predicate your answer. If you do not so contend, state what rights the public possesses in the utilization of the waters of the Big Horn River which do not require the prior consent or license of the U.S. and/or the Crow Tribe. State the factual basis upon which you predicate either answer. Answer: See responses 33 through 41 which adequately answer the interrogatory.

* * *

ORDER

There are presently pending in the above-entitled action two motions for summary judgment. The Court having reviewed the motions, and the briefs in support of and in opposition thereto, finds they should be denied.

The outlines of the controversy herein are clear. However, summary disposition of the case would preclude an adversary trial which alone can establish a reliable foundation for determining the breadth and scope of the positions formulated by the respective parties. *Arenas v. United States,* 322 U.S. 419 (1944). Thus, summary judgment must be denied. Furthermore, the existence of matters of public importance, a factor present here, can preclude summary disposition. This is especially so when summary judgment would be used in such a manner that as much expense and effort would be incurred in establishing a case for summary judgment as would be involved in an actual trial. *See,* 6 Part 2, *Moore's*

Federal Practice, § 56.16, p. 56-661. Therefore,

IT IS ORDERED that the motion of the United States for summary judgment, and the motion of the intervenor Crow Tribe of Indians for summary judgment be, and the same hereby are, denied.

IT IS FURTHER ORDERED that the parties immediately, or no later than June 5, 1978, exchange the names and addresses of each of their witnesses and the general subject matter upon which the witness will testify, together with a list of all exhibits upon which a party intends to rely.

IT IS FURTHER ORDERED that counsel for plaintiffs convene an attorneys' conference during the week of June 12, 1978, for the purpose of completing the final pretrial order in the form prescribed.

IT IS FURTHER ORDERED that the final pretrial order be filed on or before June 19, 1978.

IT IS FURTHER ORDERED that counsel for the parties appear before the Court, in Chambers at Billings, Montana, on June 20, 1978, at 9:30 o'clock a.m., for a final pretrial conference.

IT IS FURTHER ORDERED that trial of the case commence before the Court, sitting without a jury, at 9:30 o'clock a.m. on June 27, 1978, as the first case on that day. Estimated time of trial is one day.

Done and dated this 25th day of May, 1978.

United States District Judge

ANSWERS TO COMBINED SUPPLEMENTARY INTERROGATORIES, REQUESTS FOR ADMISSIONS AND REQUESTS FOR PRODUCTION OF DOCUMENTS.

(Record on Appeal, pp. 815, 820-821, and 845)

On March 8, 1978, the Crow Tribe of Indians served and filed objections to Combined Supplementary Interrogatories, Requests for Production of Documents. The Answers thereto were withheld pursuant to further order of the Court.

* * *

13. What rights to you contend are included within the term "riparian rights" under federal common law? Please consider this as a request pursuant to F.R.Civ.P. 34 for production of any and all documents which support your answer. *ANSWER:* The case of *Namen v. Confederated Salish and Kootenai Tribes,* ____F. Supp. ____ (D. Mont.) *aff'd* ____F.2d ____ (9th Cir. 1976) controls this question to the extent of all rights, *but* hunting and fishing.

14. Do you admit that the extent of the grant to Muskrat, including all rights impliedly granted by the patent to Muskrat, is to be construed according to the law of the State of Montana? If no, state the factual basis upon which you deny this request for admission and consider this as a request pursuant to F.R.Civ.P. 34 for any and all documents supporting your answer. *ANSWER:* Denies.

* * *

17. Has the Crow Tribe been compensated for all land conveyed to the State of Montana within the original boundaries of the Crow Reservation? If not, describe that land for which compensation has not been received and state the factual basis as to why that land has not been paid for. Please consider this as a request pursuant to F.R.Civ.P. 34 for produc-

tion of any and all documents supporting your answer *ANSWER:* Yes, to the best of the Tribe's knowledge.

* * *

95. Are non-tribal members residing within the Crow Reservation permitted to participate in tribal government, vote in tribal elections, and hold tribal office? If so, state each category and the factual basis which supports your answer. *ANSWER:* No.

PRETRIAL ORDER

I.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under the provision of 28 U.S.C. 1345, which provides that the federal district

courts shall have jurisdiction of all civil actions commenced by the United States. Crow Tribe 28 U.S.C. 1362 — Jurisdiction.

II.

AGREED FACTS

The Crow Tribe of Indians is an Indian Tribe with a constitution and governing body duly recognized

by the Secretary of the Interior. The United States and the Crow Tribe first treated together by a Treaty of August 4, 1825, 7 Stat. 266. This treaty was a treaty of peace and friendship.

By the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749, the United States first acknowledged the territory of the Crow Tribe. The United States recognized in Article V of that treaty that the Crow Tribe occupied approximately 38½ million acres located in Montana and Wyoming.

On May 7, 1868, the United States and the Crow Nation entered into the second Treaty of Fort Laramie, 15 Stat. 649. This treaty granted the Crows a reservation of 8 million acres located entirely in the territory of Montana.

Congress reduced the reservation by a series of four acts: 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); and 50 Stat. 884 (1937). The reservation today comprises 2.3 million acres. Thirty-one percent of that acreage, or approximately 700,000 acres, is presently owned by non-Indians.

The portion of the bed of the Big Horn River as described in paragraph 3 of the complaint of the United States lies wholly within the exterior boundaries of the Crow Indian Reservation. The Big Horn River is navigable.

On October 13, 1973, the Crow Tribal Council passed a resolution which prohibits all persons except tribal members from hunting, fishing, and trespassing within the exterior boundaries of the reservation.

The State of Montana has in the past and continues to assert the right to exercise regulatory authority over hunting and fishing of non-Indians within the exterior boundaries of the Crow Indian

Reservation. Specific acts of the State include the announcement of the opening or closing of hunting season to all lands within the reservation; publishing hunting maps to the public which indicate that hunting is allowed on the entire reservation for deer, bear, and mountain lion; and issuing hunting and fishing licenses which purport to allow non-Indians to hunt and fish within the exterior boundaries of the Crow Indian Reservation.

The State owns certain lands that are riparian to the Big Horn River. The State is a successor in interest to an Indian allottee. The state is a purchaser of land included within an allottment to an Indian allottee. A description of a portion of lands owned by the State riparian to the Big Horn River are described in the patents attached hereto as Exhibits "A" and "B". These lands were acquired by the state to provide the public with fishing access to the Big Horn River.

III.

CONTENTIONS OF THE UNITED STATES

1. The United States holds the bed and banks of the Big Horn River in trust for the Crow Tribe of Indians.

2. The Crow Tribe and the United States have the sole authority to regulate hunting and fishing on the Crow Indian Reservation.

3. The Crow Tribe of Indians has an exclusive treaty right to hunt and fish on the Crow Reservation.

4. The State of Montana has no authority to regulate hunting and fishing by members or non-members on the Crow Indian Reservation.

5. The treaty right of hunting and fishing possessed by the Crow Tribe is a tribal, not individual, right, and therefore there was no "allottment" of the treaty right to hunt and fish to members of the tribe, and no implicit conveyance of that right when fee patents were issued.

6. A riparian right of fishing does not exist.

7. If a riparian right of fishing exists, that right is still subject to regulation by the sovereign, in this case, the Crow Tribe of Indians.

The defendants will file their contentions as a separate document to be appended to this order.

IV.

STIPULATION

The parties stipulate and agree that they waive any objections as to authenticity of any documents which have been presented for inspection and copying and which have been listed as exhibits by any party.

V.

LAW PROBLEMS

The State of Montana and the intervenor defendants dispute the above contentions of the United States and therefore the law problems need not be stated separately.

VI.

EXHIBITS

The exhibit list of the United States is appended to this order. The other parties will file their exhibit lists separately.

VII.

WITNESSES

The United States will call two witnesses.

A. Barry Betts, Game Biologist, U. S. Fish and Wildlife Service, Billings, Montana, will testify concerning tribal-federal game management activities on the Crow Reservation.

B. Ron Ulrich, Fish Biologist, United States Fish and Wildlife Service, Hardin, Montana, will testify concerning tribal-federal fish management activities on the Crow Reservation.

The other parties will file their witness list separately.

DATED this 20th day of June, 1978.

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CROW TRIBES

TRIAL BRIEF

ISSUES

1. The United States holds the bed and banks of the Big Horn River in trust for the Crow Tribe of Indians.

a. Nature of the Quiet Title Action.
The Treaties, 1851 and 1868.
2. *The Statutes.*
(a) Legislative history.
3. *The Cases.*

b. Choice of Law: Federal Law.
1. The U.S. holds the Big Horn River bed in trust for the Crow Tribe to the high-water mark.

2. The Crow Tribe and the United States have sole authority to regulate hunting and fishing on the Crow Indian Reservation.

3. The Crow Tribe of Indians has an exclusive treaty right to hunt and fish on the Crow Reservation.

4. The State of Montana has no authority to regulate hunting and fishing by members or nonmembers on the Crow Reservation.

a. The effect *Oliphant* and *Wheeler* on Tribal Regulation of hunting and fishing. (Same as U.S. Brief).

5. The treaty right of hunting and fishing possessed by the Crow Tribe is a tribal, not individual, right, and therefore there was no "allotment" of the treaty right to hunt and fish to members of the tribe, and no implicit conveyance of that right when fee patents were issued.

6. A riparian right of fishing does not exist.

7. If a riparian right of fishing exist, that right is still subject to regulation by the sovereign, in this case, the Crow Tribe of Indians.

8. Indian Civil Rights Act matters.

I. THE UNITED STATES HOLDS THE BED AND BANKS OF THE BIG HORN RIVER IN TRUST FOR THE CROW TRIBE OF INDIANS.

a. *Nature of the quiet title action.*

Under the first claim for relief the United States prays for the following:

> 3. Under both treaties the Tribe reserved to itself a property right in that portion of the riverbed of the Big Horn River to the high-water mark lying east of the mid-channel from the point where the river crosses the Wyoming-Montana state line to a point where the river crosses the Wyoming-Montana state line to a point where the river crosses a true meridian line which lies 15 miles due north of the established line between Montana and Wyoming, and the entire bed of the Big Horn River to the high-water mark lying between that point where the river crosses a true meridian line which lies 15 miles due north of the established line between Montana and Wyoming and the point where the river crosses the present northern border of the Crow Indian Reservation, with the exception of that portion of the bed of the river acquired for the construction of the Yellowtail Dam and project pursuant to the Act of July 15, 1958, 72 Stat. 361, which is owned in fee by the United States. (Amended Complaint of Intervenor Crow Tribe, pages 1-2 of Averment No. 3.)

This is in the nature of a quiet title action: To quiet title to the bed of the Big Horn River in the name of the United States for the Crow Tribe of Indians.

The present controversy has not gone without judicial treatment. In 1976, the Ninth Circuit Court of Appeals ruled that the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation were held in trust by the United States for the Crow Tribe. The *United States of America v. James Junior Finch,* 548 F.2d 822, *reversed on other grounds,* ____U.S.____(1977) (hereinafter *Finch*). In *Finch* as well as this case the essential question is as follows: Whether the United States either transferred beneficial ownership of the bed held for the Crow Tribe by the Treaties of 1851 and 1868, or retained ownership of the bed as *public lands,* which passed to the State of Montana upon admission to the Union. *Finch* p.

It is, therefore, necessary to review the applicable treaties, their negotiations, and the statutes admitting the State of Montana to the Union, and the applicable case law.

1. *The Treaties: 1851 and 1868.*

The history and negotiations of the 1851 Treaty and the 1868 Treaty were considered in detail by the Court of Claims in *Crow Tribe of Indians v. U.S.,* 284 F.2d 361 (Ct. Cl. 1960); *Crow Nation v. U.S.,* 81 CT. Cl. 238 (1935); and *Fort Berthold Indians v. U.S.,* 71 Ct. Cl. 308 (1930). The relevant historical materials from the above cases were thoroughly analyzed by the court in *Finch,* p. 829-831. Those historical materials have been submitted into evidence by the Crow Tribe. (C.T. No. 4). That analysis need not bear repeating.

However, the assurances given the Indians by the Government during the negotiations of the Treaty of

1851 are most appropriate.

> Territories at issue were referred to as "your country" and "your land" and "your territory". See *Crow Tribe of Indians v. U.S.*, 284 F.2d 361, 366-367 (Ct. Cl. 1960) quoting from an address by Treaty Commissioner Mitchell at the initial counsel of the assembly representatives of the eight Indian nations, held on September 8, 1851, reported in the ●*St. Louis Republican*, October 26, 1851. *Finch*, p. 830.

The Treaty of Fort Laramie of 1851 recognized the title of te Crow Tribe to the lands described as their in Article V of the Treaty. *Crow Tribe of Indians v. U.S., supra*, at 367. That territory pursuant to Article V reads as follows:

> The aforesaid Indian nations do agree, recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:
>
> ". . .the territory of the Crow Nation commencing at the mouth of the Powder River on the Yellowstone; then hence up the Powder River to its source; then so long the main range of the Black Hills and Wind River Mountains to the headwaters of the Yellowstone River; then down the Yellowstone River to the mouth of 20-5 Mile Yard Creek; thence to the headwaters of the Musselshell River; thence down the Musselshell River to its mouth; thence to the headwaters of Big Dry Creek, and thence to its mouth. . ."
>
> It is, however, understood that in making this recognition and acknowledgement the aforesaid Indian nations do not hereby abandon or prejudice

any rights or claims they may have to other lands; and further they do not surrender the privelege of hunting, fishing, or passing over any of the tracts of country hereinfore described.

The Second Treaty of Fort Laramie, approved in 1868, 15 Stat. 649, granted a reservation of some eight million acres, all within the 1851 reservation. Article II of the Treaty reads as follows:

the United States agrees that the following district of country, to wit:

Commencing where the 107° of longitude west of Greenwish crosses the southern boundary of Montana territory; thence north along said 107th meridian to the *mid-channel of the Yellowstone River; thence up said mid-channel* of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 54th degree of north latitude; and then east along said parallel latitude to the place of beginning, shall be, and the same as, set aprt for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly Tribes of individual Indians as from time to time they may be willing, to the consent of the United States, to admit amongst them, and the United States now solemnly agree that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservation and discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in the article for the use of said Indians, and henceforth they will, and do hereby, relinquish

all title, claims, or rights into any portion of the territory of the United States except such as embraced within the limits aforesaid."

during the negotiations of this Second Treaty, the government now acting through the Commissioner of Indian Affairs, again used language indicating that the Crows were to own the territory covered by the Treaty. *See,* footnote 13 *Finch,* quoting from *Finch,* p. 830.

"Furthermore, the terms of the 1868 Treaty themselves evidence and intent on the part of the United States to recognize that the Crow Indians were to have beneficial ownership of all lands within the exterior boundaries of the reservation."

The *Finch* Court then held:

"Both the assurance is given to the Indians during the negotiation of the Treaty of 1868, considered against the background of the Treaty of 1851, and the explicit language of the 1868 Treaty *could have had no other meaning in the "minds" of the Indians* than that the government recognized that all the lands within the metes and bounds of the reservation were to be theirs. We thus conclude that the United States, by signing the Treaty of 1868 with the Crows, intended to grant to them dominion and control over that portion of the bed of the Big Horn River situated within the reservation, subject to the retained power of the United States to exercise its paramount right to control navigation on the river." (Emphasis supplied). *Finch,* p. 830.

2. *The Statues.*

According to the Act of May 26, 1864, 13 Stat. 85, the territory of Montana was established recognizing that:

> "All treaties, laws and other engagements made by the government of the United States with the Indian tribes inhabiting the territory embraced within the provisions of this act, shall be faithfully and rigidly observed, anything containing this act to the contrary notwithstanding."

The Crows had executed the First Laramie Treaty in 1851. After the territorial Act, the Treaty of 1868 was enacted, 15 Stat. 649. In 1882, the Crow Tribe negotiated and Congress recognized another statute, Act of April 11, 1882, 22 Stat. 42.

The Enabling Act of February 22, 1889, 25 Stat. 676, by which the territory of Montana became a state, provided as follows:

> "The people inhabiting said proposed states do agree and declare that they forever disclaim all right and title . . . to all lands lying within the limits owned or held by an Indian or Indian Tribe."[1]

Pursuant to and as a pre-condition of statehood the State of Montana enacted as its Constitution the following language in Article I:

[1] Identical language is to be found in the Enabling Acts covering utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 26, New Mexico, 36 Stat. 557, 558-559, and Arizona, 36 Stat. 595.

Ordinace I.

2. The people inhabiting said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian Tribe, and that until title hereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian shall remain under the absolute jurisdiction and control of the Congress of the United States, that the lands belonging to citizens of the United States residing without the said state of Montana, shall never be taxed a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said state of Montana on lands or property thereof belonging, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the state of Montana from taxing these other lands or tax any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such act of Congress may prescribe.

The year 1889 is significant in that not only Montana, but the states of North and South Dakota and

Washington became states under the same Enabling Act. Act of February 22, 1889, 25 Stat. 676. All those states contained significant populations of Indian people and reservations. The impact of the Enabling Statute is critical: the new states "disclaimed" control over those reservations.

a. Legislative history.

On its face no clearer statement by Congress could have been made to exclude the operative effect of state jurisdiction from Indian reservations within the new states. This clarity is also indicated from the legislative history of the Enabling Acts which resulted in the admission of North Dakota, South Dakota, Washington and Montana.

At 19 Cong. Rec. 2021 (U.S. Ex. 4(a)) the statehood bill was reported back from the committee and tables. Consequently, a companion bill concerning the dakotas alone was debated. At 19 Cong. Rec 2831-2838. (U.S. Ex. 4(b)). Section 6 of that bill appearing at page 2838 an extract from a report was read into the record.

> "Another reason for opposing the admission of Dakota (into two states) as provided for in the pending bill, is found in the fact that these are in time nine Indian reservations, the jurisdiction over which is reserved to the United States, *and* excluded from the proposed state so long as Indian Titles exist."

At page 2 of the House Report No. 1025, 50th Congress, First session (1888) (U.S. Ex. 4(f)), following is stated by the Committee on the territories.

"The convention shall also provide that the proposed States shall forever disclaim all right and title to the unappropriated public lands thereof, and to all lands lying within the limits of each state owned or held by any Indian, or any Indian Tribe, and that until the Indian titles thereto shall have been extinguished by the United States, such reservation shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under absolute jurisdiction and control of the Congress of the United States."

Further at page 10 in the committee states:

In the northern portion of Montana there are numerous Indian reservations, *the lands within which are excluded from the operation of this bill. . .*"

In face of the above legislative history it is strained to assume that the future state of Montana would have assumed to the title to the riverbed of the Big-Horn River upon admission to the Union, of any other lands lying within the Crow Reservation.

There is further legislative history. The maps following page 25 of the report show the Great Sioux Reservation as it existed at the time. There are no counties within that reservation.

Finally, the debate appearing at 20 Cong. Rec. 798, to 828 sheds further lights on the meaning of the disclaimer clause. At page 807 the disclaimer language is found at Section 4 of a substitute bill offered by Mr. Springer. Debate upon his amendment proceeded and the following comments by members appears at pp. 812 to 813.

There is another question here to which the gentleman has referred which requires special mention, and that is found in subdivision 2, of Section 4, in reference to Indian lands and Indian property. I desire to say in this connection that this constitution and the Senate bill underwent severe criticism on this point in the Senate Committee, and in the Senate itself when it was considered and discussed there. It is precisely the same provision that has been placed in the compact between the States in several instances and the United States upon their admission to the Union. There can no trouble arise out of that provision. Why, sir, our Territory has had jurisdiction over certain Indians for many years, and those Indians have suffered no hardships in consequence. The provision is the usual one.

But I want to call attention now to the peculiar provisions of this subdivision of this section. I cannot imagine where the gentleman from Illinois found them or what he drew them from. They are most extraordinary. Why, sir, under this subdivision if a man who has a single drop of Indian blood in his veins holds a section of land we can not even lay out a highway over it. We can not exercise any right of eminent domain over the land, no matter whether he has held it one year, or twenty-five years, or fifty years; and every man is held to be an Indian who has Indian blood in his veins, and there are many such in Dakota. I will read the provision:

"Second, That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof,

and to all lands lying within said limits owned or held by any Indian or Indian tribes."

We must have jurisdiction over these Indians to a certain extent.

We are perfectly willing that the United States shall exercise jurisdiction over the lands belonging to Indian Tribes, and over all public lands.

Under the Senate bill and the Constitution we will have no more jurisdiction over these matters than has the State of Michigan, Minnesota, or any other state.

We are to recognize tribal relations in connection with Indians for only a very short time longer. Our proposed State can not submit or consent to any such provisions as these.

"Except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus exempted from taxation."

The provision is all right. We have no objection to the usual provision for the protection of Indians in their property, but extraordinary provisions of the character found in this bill are unjust and ought not to be made.

Despite the protest that the disclaimer clause was "unjust" it was enacted in its unamended form.

Likewise, the delegates to the Constitutional Convention of 1889, which adopted the First Montana Constitution appreciated the "disclaimers"

meaning.[2] The concern and debates over the "disclaimer clause" of the Enabling Act was not prolific. *See* (C.T. 11a).

3. *The Cases.*

In this matter the controlling case is *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), which held that the Choctaws and Cherokees owned the bed of the Arkansas River when it flowed through their reservations. In that case the United States had moved the Indians westward to what later became Oklahoma, and granted new reservations there. The United States promised that the new reservations would be permanently theirs, and would never be embraced within any state. The patents described the boundaries by metes and bounds, and were silent on the subject of the beds of rivers flowing through the reservations. The Court held the tribes owned the beds:

> "We do not believe the petitioners (the Indians) would have considered that they would have been precluded from exercising these basic ownership rights to the riverbed, and we think it very unlikely that the United States intended otherwise." 397 U.S. at 635.
>
> "We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River . . . in the grants it made to petitioners." 397 U.S. at 635-6.

Another relevant case is *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918). In that case

[2] In 1972, Montana adopted its second Constitution.

Congress granted the Metlakatla Indians a reservation as follows:

> "That until otherwise provided by law the body of lands known as Annette Island . . . is hereby, set apart as a reservation for the use of the Metlakatla Indians. . ."

Besides the Annette Islands, the question was whether this language included the adjacent navigable waters and submerged lands to be the "body of lands known as Annette Islands." A private company had erected a fish trap (lawful under Alaska territorial laws) in navigable waters within what the Secretary of the Interior had interpreted from the statute to be the boundaries of the reservation.

Transcript Pages 92-169
Testimony of Joe Medicine Crow
DIRECT EXAMINATION

BY MR. SCHOPPERT:

Q Mr. Medicine Crow, I have quite a few questions for you. I want you to make yourself comfortable. I am going to go over a series of questions right now that deal with what lawyers call foundational questions, that deal with your background and your educational degrees and then I believe we will recess for the lunch period. I have asked the Court for this indulgence. Can you hear me all right? Would you please state your full name for the record? A Joseph Medicine Crow.

Q Where do you reside at the present time? A Lodge Grass, Montana.

Q Are you an enrolled member of the Crow Indian Tribe? A Yes, sir.

Q: Would you please state the date you were born? A: October 27, 1913.

Q: That would make you 65 years of age. Presently what is your occupation? A: I am the Executive Director of the Crow Indian Education Commission.

Q: What is the Crow Indian Education Commission? A: It was created by the Tribal Council for the purpose of running various types of educational activities, such as Headstart, Adult Education, teachers training, and many other special educational conferences and programs.

Q: And it is a part of the Crow Tribal Government structure; is that correct? A: Yes.

Q: How long have you held that particular position? A: Since June 26, 1972.

Q: Joe, decade by decade, could you please outline the periods of time you have been on the Crow Reservation. Say, from your birth for the first tenyears, did you reside on the Crow Reservation? A: Yes. I left the reservation for the first time in September, 1929, to go to a boarding school in Oklahoma. I finished the eighth grade there. Went back and finished high school. Went back and completed two years of Junior College there.

Q: Can you name that institution, please? A: Bacone College at Muskogee, Oklahoma.

Q: Then where did you reside after you got through Junior College? A: I transferred in the Fall of 1934 to Linfield College at McMinnville, Oregon, and attended college there two more years.

Q: Did you receive a degree from Linfield College? A: Yes, sir.

Q: What is your degree in? A: Bachelor of Science in Sociology and Psychology.

Q: What was the date, approximately, of that time, Joe? A: From September, 1936 to May, 1938.

Q: Then where were you located at or where did you reside? A: All of 1938 I enrolled at the University of Southern California, Los Angeles. Completed my Master's Degree June, 1939. Continued with my Doctorate Degree program for two more years until 1941. May, 1941.

Q: And your Master's Degree program was in Anthropology; is that correct? A: Yes, sir.

Q: And the two years into your Doctorate Degree, which I assume you have not received the official paper, is also in Anthropology? A: And Archaeology, yes.

Q: And Archaeology. When did you become the Crow Tribal Historian, the official Crow Tribal Historian? A: Approximately 1950 or '51. It was done through Tribal Council action at Crow Agency, Montana. It was a floor motion and adopted by the Council in session at the time.

Q: And you have been on the reservation primarily ever since you have been historian? A: Yes.

Q: Has anybody else ever held the position after you have, of official Crow Tribal Historian? A: Not to my knowledge. I am still serving in that capacity.

Q: When you refer to Crow Tribal Historian, I am referring it to our modern sense, but there are gentlemen, are there not, that keep tribal records in their head; is that correct? A: Yes, sir.

Q: And the Crows don't have a true written history, do they? A: Up until recent times the history of the Crow Tribe was kept by story tellers, keeper of records, tribal lands.

Q: Would you qualify as one of those keepers? Do you keep any of those particular stories or records? A: Since my appointment to that historian position in 1950 or '51, I have endeavored to collect all the data I could about Crow history and Crow culture

and have made notes and compiled data and I am in a position to write any segment of the tribal history.

Q: Now, you have published, have you not, some records — excuse me, you have published some introductions, prefaces and books. Can you name those books for the record, please? A. Yes. In about 1968, I think around there, that I compiled a booklet containing all the treaties of the tribe with the United States Government and all the agreements and all the various actions of Congress pertaining to the Crows up to 1959. I called it, "A Handbook of Crow Indian Treaties, Laws, and Regulations."

Also, I have written an introduction to two historical books. One was a reprint of Thomas B. Marquis' book called, "The Memories of Thomas C. Laforge, White Crow Indian," and also the introduction to a recent edition of another Thomas B. Marquis work on the Custer battle, now called, "Keep the Last Bullet For Yourself."

Also, I have contributed special documents to the United States Government, especially to the Task Force on American Indian Review Policy. And also, I have, at the present time being printed a document on the Crow Indian Buffalo jump technique to be published by the Northern Plains Anthropological Society. Also, I have another anthropological paper to be published by the University of — no, Montana State University at Bozeman, with a title, "From MM to MD, or From Medicine Man to Doctor of Medicine."

Q: I know you get sensitive or are sensitive about tribal politics, but you have reviewed a recent case of this Court, have you not, called Patrick Stands Over Bull vs. Bureau of Indian Affairs. Have you read that opinion? A: I haven't read the opinion, but I know about it.

Q: Do you know about the historical analysis of the Crow Tribal government that I showed you? A: Yes.

Q: And that was an extract — that was taken from an extract that you had prepared as a Crow Tribal report to the American Indian Policy Review Commission; is that correct? A: Yes, sir.

Q: And in all fairness, you did not prepare that document for that trial did you? A: That's right. Correct.

Q: Did you ever do work for the State of Montana in any interpretive exhibits? A: I am on the Board of Directors of the Montana Historical Society and as such, I have done some work for the Montana State Fish and Game Commission as a member of the board, Indian Board, working with the museum at Pryor, Montana, called the Plentycoups Museum.

Q: What is your — the history that you have gathered, what is your historical analysis? In your deposition you had outlined a historical anaylsis that you used to make your conclusions. Can you outline that for the Court, please? A: I use three approaches to my conclusions in writing certain aspects of the Crow history.

Number 1, I read the reports of early whitemen who had come to the Indian country, such as traders, trappers, mountain men, missionaries, civilian government people, the military people, and also, I read archaeological reports of certain excavations where migration routes of tribes have been more or less determined or studied at least, and, also, I use an oral history, oral traditions of the Crow Indian story tellers. I compare the three sources together and then I would come out with the most feasible, logical version.

Q: Okay. I want to draw your attention to your

third system of analysis. There will be a witness called by the name of Henry Hank Old Coyote. Are you satisfied in your mind that Henry would qualify as a keeper of records for the Tribe or for his family? A: Yes, sir.

Q: And to your knowledge, is Henry's versions, without going into those versions, accurate?

MR. ROTH: Object to that upon the ground and for the reasons he is asking this witness to comment upon the credibility of another witness and that is purely the province of this Court.

THE COURT: Yes. I don't think it is necessary.

MR. SCHOPPERT: I would like to recess here if I could, Your Honor. Basically I will outline just for a minute what I will attempt to accomplish after lunch.

We will go into the Crow Tribal Government history and its relations to the United States and then we will go into what the Crow Tribe perceived as the treaties and their relationship to hunting and fishing.

THE COURT: All right, we will be in recess until 1:00.

(Recess.)

AFTERNOON SESSION

MR. SCHOPPERT: Your Honor, Mr. Lynaugh would like to excuse himself from the proceedings this afternoon.

THE COURT: Yes, that is fine.

BY MR. SCHOPPERT:

Q: Continuing the questioning of Mr. Joe Medicine Crow. Mr. Medicine Crow, do you know the Crow language? A: Yes, sir.

Q: Is there a word in the Crow language for fish? A: Yes.

Q: Could you phonetically pronounce that word so the man can get it in his machine there? A: Bua-chi-la-chio. Bua means fish. Chio means to snare.

Q: Joe, is there a word in Crow for elk? A: Yes, sir.

Q: Can you say that word? A: Eechee-Ligashe.

Q: Can you write that one down for the reporter? Is there a word in Crow for trout? A: Yes, sir.

Q: Can you say that word, please? A: Bua-xaxe.

Q: Can you please write that for the reporter?

Q: Are there other words, Joe, that relate to fish, other types of fish, like a ling or a sturgeon? A: Yes.

Q: Could you write the word for ling? I think the English is l-i-n-g. A: Bua-Iia-xa-xe.

Q: Can you write that on paper, please? Is there a word in the Crow language, "To hunt"? The verb to hunt? A: Yes.

Q: Can you say that? A: Ah-shua.

Can you write that on your paper? Is there a word in the Crow language that says, "To fish"? The verb, "To fish"? A: Bua-chi-la-chio.

Q: Can you write that on your paper, please? A: That was the first one.

Q: "To fish" was the first one? A: Yes.

Q: Do "To hunt" then. I asked you the noun fish, but you gave me the verb in the first instance; is that correct? A: Okay. The noun for fish is bua. "To fish" means bau-chi-la-chio. Letter La means "To

snare fish."

Q: Has the Crow language or do the Crows distinguish between a historical Crow and a modern Crow language? Have some of the words undergone changes? A: Yes, sir.

Q: So if we were to go back, say, a hundred years, the Crows would speak a little differently than they do at the present time. Is that an accurate generalization? A: Yes.

Q: Now —

A: Language is changing.

Q: Now, these words, have they undergone any change, to your knowledge? A: Words that you have asked about?

Q: Yes, those words on the paper. A: About the same.

Q: Would you — could you tell us where the Crow Tribe or give us a general historical overview prior to 1851 where the Crows were located when they moved from various locations and whether — and what they subsisted on, whether it was fish or whether they were agriculturalists or whether they were — they lived off flesh animals? I think for a convenient starting place, let's go to the area in Canada. Can you bring us forward to the signing of the Treaty of 1851? A: Oral traditions—

MR. ROTH: Your Honor, may I insert at this particular time an objection to this line of questioning upon the grounds and for the reasons, one, improper foundation; two, perhaps hearsay; number three, lack of qualifications of the witness as to this particular subject matter; four, the sources or the data upon which he relies in forming his opinion.

THE COURT: Overruled.

BY MR. SCHOPPERT:

Q: Could you please state to your knowledge or to the oral traditions of the Tribe where the Tribe originated from? A: The ancestral tribe from which the Crow Tribe developed originated out of a so-called woods and lakes region of what is now Winnepag Lake country.

Q: What did the Crow Tribe subsist on at that present time? A: As woodland Indians, they lived on deer of the forests small animals like rabbits, muskrats, waterfowl, ducks, geese, and fish.

Q: Were there one or two or three bands of Crows involved there or was it one single unitary band of tribes? A: At that time it was one tribe. There was a tendency for a division of the Tribe.

Q: About what time did the Tribe move out of that particular area historically? A: About 1550.

Q: And where did they move to? A: Migration headed southwest. Stopped for a short time at what is now Devils Lake, North Dakota. Then reached the Missouri River.

Q: Who did they live with when they reached the Missouri River? A: They first moved in with a band of Mandan Indians.

Q: Did they stay long with the Mandans? A: Not too long. Several years.

Q: What did they subsist on when they lived with the Mandans? That was on the Missouri River; is that correct? A: Yes, sir.

Q: What did they — A: The Mandans were agriculturalists and they no doubt had corn, squash and perhaps other crops, which was supplemented with deer, antelope, small birds and small game and, of course, fish again.

Q: Did they stay long with the Mandans? A: Not

too long. Perhaps 15, 20 years.

Q: And there was another movement? A: The tribe moved about seven miles upstream to the junction of Knife River and the Missouri and established their own village of earthern lodges there.

Q: And how long did they stay in that area? A: For quite some time. But this was probably from the time they left the ancestral homes there in Winnepeg country, to the time when this second band seceded, or split, a period of about 50 years.

Q: Was there — was the reason for the split, was there an upheaval in the tribe that caused this split or migration? A: Yes. There was dissatisfaction over the division of buffalo meat, which split the tribe into two factions. The leader of one faction decided to move out westward.

Q: Where did he move to? A: He followed the Missouri River upstream and it is now believed that they went up Milk River, which the Crows in historical times called the White Bear River and settled for some time in the Lethbridge, Alberta, Canada area.

Q: Did they move from there, then, after they were in that area? A: From there they moved southwrd for a long, long time and finally came to a lake which the historians describe as so wide that they could not see the other side and so salty that they could not drink it, no doubt the Great Salt Lake.

Q: And how long did they stay in that particular area? A: A number of years, but no one knows for sure.

Q: Is that when they finally, then, moved into the present area?

MR. ROTH: Objected to as leading. Let the witness testify.

THE COURT: Sustained.

BY MR. SCHOPPERT:

Q. How long did they stay in the Salt Lake area? A: I believe 15, 20 years.

Q: And then where did they go? A: The Tribe moved eastward to a place the historians now call Where There is a Fire.

THE COURT: Where there is what?

THE WITNESS: A fire. Where There is a Fire. We do not know where this place is to this date.

Q: How long did they stay there? A: Some years. Not too long.

Q: And then where did they move? A: The Tribe moved north, northward, and eventually hit the Missouri again, probably near the present boundary line of Montana and North Dakota, about the year 1600-1700.

Q: How long did they stay there? A: Not long.

Q: And then where did they go? A: Started coming up the river. And this time they either come up the Yellowstone or followed the Missouri to the Three Forks area.

Q: Did they settle in that particular area? A: Yes, they roamed and wandered about looking for a good place to settle.

Q: And where did they finally settle, or was there a final settlement? A: In this area of Three Forks, Yellowstone Valley, Musselshell, and clear into Wyoming.

Q: When the Tribe made its last move from the North Dakota-Montana Border to its present location, were there any other tribes located here? A: Yes, sir.

Q: And which one were those? A: Shoshones were on Three Forks, Montana. Some Flathead were in the Great Falls area. And a small tribe of Kalispell further north of Great Falls.

Q: Did these tribes continue to live with the Crows or what happened? A: Shortly after the Crows arrived in this area, the Shoshones went back south into the plateau area. And some time after, some years, the Blackfeet would come down from the Canada area and chase the Flatheads and the Kalispell back over the Rocky Mountains.

Q: Now, I would like to digress for just a moment. Were there any — has your research led you to discover any what we would call prehistoric tribes in this area? That would be tribe probably before the Crow or Shoshone or Flatheads.

A: Oh, yes. Archaeologists have excavated and uncovered various prehistoric Indian camps and cites, carbon dated back to 10,000 years ago.

Q: And some of those locations are in the Yellowstone Valley at the present time? A: Yes, about five miles from here is a good location called Indian Cliffs. That dates back to 8000 years ago, probably more.

Q: When the Tribe settled in its present location, what kind of a culture classification was it? What would you refer to the Tribe as? A: At the time this new Tribe had come into this area, after 100 years of migration, that they had developed a nomadic big-game hunting tribe.

Q: Would its culture center around buffalo? A: Yes sir.

Q: Would the Crow Tribe be classified as a Pacific Northwest salmon fish culture tribe? Not at all, sir.

Q: Would that mean that the Crows would not eat fish? A: That doesn't mean that.

Q: But what would the Crows use the fish in the rivers and streams for primarily? A: They would eat fish as a supplement to their buffalo meat diet and also in times of game scarcity, they will eat fish.

Q: Has your research disclosed to you the first written indication that the Crows even referred to fish? Do you have any record to that effect? A: Yes, sir.

Q: Can you name that record? A: The report of the Council meeting near Livingston, Montana, of May, 1873, the Chief's spokesman for the Crow Tribe, Chief Sits in the Middle of the Land, known as Chief Blackfoot by white historians, mentioned fish.

Q: I will show you what has been marked Tribal Exhibit No. 74. It is a document that Mr. Medicine Crow refers to. It is an extract from the treaty negotiations, I believe, that culminated in the 1882 agreement; is that correct? A: Yes, sir.

MR. HERRON: Objected to as leading.

THE COURT: What was the number again?

MR. SCHOPPERT: 74, Your Honor.

THE COURT: I have it listed as house executive document No. 89, 43rd Congress.

MR. SCHOPPERT: that's correct.

THE COURT: Are you offering it?

MR. SCHOPPERT: Yes, I am offering that into evidence.

THE COURT: I note there is an objection. Would you state the objection?

MR. HERRON: I was objecting at that time, Your Honor to counsel's last question.

THE COURT: He is offering 74 now.

MR. ROTH: You are offering 74?

MR. SCHOPPERT: Yes.

MR. ROTH: To which the State of Montana objects upon the grounds and for the reasons it is an incomplete document. Further, that it is replete with hearsay. There does not appear to be any foundation

upon which the trustworthiness of the document or at least the statements contained in the document can be predicated. And the fact that these things were said, obviously that is a fact. Whether or not those things are true, the document doesn't speak to at all. I submit to Your Honor that without further foundation as to the authenticity of this document, that it should not be admitted.

Furthermore, I suspect that the national archives have the treaty or council minutes someplace there, and they would be the original best evidence of what was said by various parties to that Council meeting.

Now, the Tribe has — although this witness, I believe, on cross-examination or perhaps direct examination, will admit he is familiar with government archives and the manner of researching those archives, nevertheless, the base or organic document that would actually verify what was said at the Council meeting is not before Your Honor. I submit this is very, very poor, secondary evidence of what went on at that meeting?

MR. SCHOPPERT: Your Honor, I can clear this up in a minute. We gave them the primary document. Here it is in my hand. We gave that to them June 12th.

We hadn't taken Mr. Medicine Crow's deposition yet he did refer to this document. It can be completely no surprise. This is contained in this. This is what this document is, the house documents that Mr. Medicine Crow typed off of this. This is what produced this; isn't that correct, Joe?

Do you remember this document, the treaty negotition?

THE COURT: Does that change your objection?

MR. ROTH: No, I don't Your Honor. It is not the complete Council minutes.

MR. SCHOPPERT A; There are the Council minutes.

MR. ROTH: All right, then I will withdraw my objection to the — just a moment, Your Honor. Let me check this.

I will withdraw my objection that the complete Council minutes have not been available to us. But I submit the excerpt out of these particular minutes is meaningless without the entire report.

MR. SCHOPPERT: Could we move then to admit the entire report?

THE COURT: You certainly may move to do so.

MR. SCHOPPERT: We move to admit the entire report and substitute — this is Exhibit 74 instead of the extract that Mr. Medicine Crow has prepared.

MR. ROTH: No objection.

THE COURT: All right, better remark the whole document. You are withdrawing the original 74?

MR. SCHOPPERT: Withdraw the extract.

THE COURT: All right, counsel having withdrawn objection to No. 74, 74 will be received.

(Whereupon, Plaintiff's Exhibit No. 74 was received into evidence.)

MR. SCHOPPERT: May I also have leave of Court to get a Xeroxed copy of this?

I will deposit this with the clerk.

BY MR. SCHOPPERT:

Q: Joe, was Blackfoot, or Sits in the Middle, was he present at any of the treaty negotiations? A: He was at the Fort Laramie Treaty of 1869. He was the leading spokesman for the Crow Tribe.

Q: You have no doubt had the opportunity to read the Treaty of 1851, have you not? A: Yes, sir.

Q: And that treaty mentions hunting and fishing, do you remember? A: In general terms they may hunt wherever they can.

Q: And the Treaty of 1868, though, mentions hunting in unoccupied areas? A: Yes.

Q: Through the oral traditions of the Tribe, how would you define the word "hunting"? A: To hunt for food which includes large game animals, birds, and I suppose even fish, anything that is edible.

Q: After the signing of the treaties, what happened to Crow Tribal Government after that particular time, can you give us a historical sketch of what happened? A: The Treaty of 1868 required the Crow Indians to report to the newly appointed Indian Agent near Livingston, Montana, by 1870, and were to take their orders from the new agent henceforth.

Q: Around this period of time, what type of a governmental system existed for the Crows? A: Up to 1868, and even up to 1870, the chiefs were in charge of the affairs of the Tribe. There would be one main chief, chief of all bands, and then there would be ban chiefs and there would be advisors. They handled all the affairs, the government of the Tribe.

Q: Did they handle the Tribe's relationship with the Federal Government? A: Yes, sir.

Q: How long did that particular system last? A: It came to a rather abrupt end in 1870, but by 1872 they came back again into power, so to speak.

Q: How long did that last? A: That lasted until the last main chief died in 1932.

Q: 1932? Did the Crow Tribe — can you explain what the Crow Tribal delegations consisted of from the period of 1880 to 1920? A: Beginning in 1872, a delegation of Crow chieftans were authorized to go to Washington, D.C. to confer with the great white fathers. They took along some non-Indian, some

white men who had learned the Crow language and had become interpreters.

Since that time to the very present time, delegations would go directly to Washington, D.C., almost constantly.

Q: So the local agency that they dealt with was no more than an intermediary, but the delegation would go on to Washington and deal directly there. Is that a correct statement? A: The local agent had powers over routine activities, but when it comes to dealing with the Federal Government, mainly for further land concessions to the government, then these chiefs were involved.

Q: Did the Crow Tribal Council start to exist, the town hall — town hall, democracy-type of governmental system? At least not on paper but . . .
A: About 1904, probably '03, that a Senator Myers — no, Dickson, probably a Congressman Dickson, later a Senator, introduced a bill in Congress to open the Crow Indian Reservation. At that time the Crow Chiefs had gotten together, so to speak, and with the aid of young Crow Indians who had gone to off-reservation schools, had formed a task force, sort of, a council for the sole purpose of watching for these attempts to open the reservation. And I think that would be the beginning of our type of council as we know it today.

Q: So it was a response to the proposed Cession Acts after the 1904 Act; is that correct? A: Really it goes back to 1868. One of the provisions of the 1868 Treaty required that any further land concessions to the Crow Tribe would have to be approved by the majority consent of the male population of the Tribe. So that is why the Government had to deal with these chiefs constantly from 1818 to 1872, 1894, 1898, and 1904 when bills were then being introduced for acquisition of more Crow lands.

Q: How did the Crows look at the proposed bills? Did they welcome those or did they resist them? A: They resisted every attempt by the Government for further land acquisition. So naturally when Dickson's bill came up, they were absolutely opposed to it. Then the succeeding other bills of 1911, 1910 by Senator Myers, and all these other representatives from the state, including Senator Walsh himself, the Crows always opposed these attempts.

Q: Could you give some background? You have discussed the Crow Act of 1920, have you not, with some of the Crow participants in that — that participated in that legislation? A: Oh, yes.

Q: Can you name those gentlemen? A: At that time when the last attempt was made to open the Crow Reservation by Senator Walsh in 1909, the presiding Chieftans, Chief Plentycoups, Chief Medicine Crow, Chief Pretty Eagle, Chief Balance Rock, I think, and about six Chieftans.

Q: Was Medicine Crow related in any way to you? A: My grandfather.

Q: Have you ever discussed this matter with him personally? A: No. He died when I was only ten or something. Anyhow, these Chieftans enlisted the aid of some educated, young Crows who had come back from college, namely Harry Whiteman, Robert Yellowtail, Jim Carpenter and Barney Old Coyote, and went to Washington, D.C., to oppose the proposed bill to open the Crow Reservation.

Q: And what was the outcome of their opposition? A: The bill was killed there at that time. As a matter of fact, on the day the United States Government declared war on Germany, 1917, around there. So the Council meeting was to have taken place in 1917. That same date.

Q: What transpired after the defeat of that bill? A:

So Senator Walsh stated that he would no longer make any attempts —

MR. ROTH: Objected to as hearsay. Ask that the answer be stricken.

MR. SCHOPPERT: I will lay some foundation.

THE COURT: Yes.

BY MR. SCHOPPERT:

Q: On what do you base your general knowledge of this particular era, on what documents are you relying on? A: This interpreter, Robert Yellowtail, was my uncle, and I have heard that story almost constantly in his little booklet written about that particular — on that little delegation to Washington.

Q: This is the delegation that defeated the bill? A: Yes.

Q: Have you ever had an opportunity to discuss that defeat with any of those other gentlemen you named? A: Just with Mr. Yellowtail.

MR. SCHOPPERT: I think the series of questions, Your Honor, was after the defeat that Mr. Roth had objected to.

THE COURT: Yes.

MR. SCHOPPERT: I asked what happened then after —

THE COURT: That would be better rather than asking him what Senator Walsh said. What happened after that.

BY MR. SCHOPPERT:

Q: What happened after the defeat of the bill? A: The Senator then offered to help the Crow Tribe write a bill designed to administer the activities of the Crow Tribe and the Crow Reservation.

Q: I would like to jump just for a second to the Wheeler-Howard Act, because I am going to try to

tie those two Acts in.

The Crows rejected the Wheeler-Howard Act or what is now referred to as the Indian Reorganization Act; Is that not correct? A: That's correct.

Q: And what is the version in the community of the Crow Tribe as to why the government couldn't get enough votes to pass the Indian Reorganization Act?

MR. ROTH: Your Honor, I would have to object to this upon the grounds and for the reasons, surely as we get up to the year 1934 there must be some sort of substantiation of the testimony of this witness that are contained or that is contained in historical documents or documents which are contemporaneous with the times that he is speaking of and we don't have to rely on this witness's interpretation of what occurred or what the community attitude toward the legislation was, or the reasons why it was killed.

MR. SCHOPPERT: Well, Mr. Medicine Crow has written a history of the Crow Tribe that outlines this, that has been judicially noticed by this Court, and he prepared it, and in that particular version, Mr. Medicine Crow outlined why the Wheeler-Howard Act failed.

MR. ROTH: Well —

MR. SCHOPPERT: There must have been a sentiment among the people. The vote failed.

THE COURT: Of course, Mr. Roth, you have to understand as a trier of the fact, I will give whatever weight I feel is necessary based upon the objections that are made and Mr. Medicine Crow's testimony. It certainly has some value. I think I will overrule his objection, but I will keep in mind it goes to the weight rather than anything else.

MR. ROTH: Yes, Your Honor. I am not sure

whether the Federal Rules of Procedure still have the maxim incorporated in them where stronger and more persuasive evidence is available and the party relies upon weaker and less satisfactory evidence, that perhaps the presumption is anyway, maybe, the organic documents or the basic documents aren't in support of their particular position.

MR. SCHOPPERT: Your Honor, I think the Rule 803(20) of the Federal Rules of Evidence would cover this particular line of inquiry.

THE COURT: Overrule the objection.

BY MR. SCHOPPERT:

Q: Beginning then with the question, Joe, why did that Act, Indian Reorganization Act, fail to garner the votes necessary for the Crow Tribe to adopt it? A: The general people or the voting people and the leaders were quite convinced the Crow Act of 1920 was adequate for the administration of the Crow affairs; that it gave the Crow people sufficient room for self-determination; and that they had, up to that time, gained considerable experience in dealing directly with Congress and the White House. So they concluded we don't need this.

Q: The Tribe finally formalized the present council system of government in 1948; is that correct? A: Yes, sir.

Q: The Crows have no written history and you are preparing a written history for the Tribal Education Committee; is that correct? You are preparing a written history of the Tribe or you are helping to compile a written history of the Tribe? A: Not as a single volume. We do have parcels of written documents pertaining to various segments of Crow history.

Q: And one of those volumes was what Mr. Roth referred to — strike this.

Well, I had discussions with you before testifying today, did I not? A: Yes, sir.

Q: And you delivered to me a version on hunting and fishing that contained certain archival materials; is that correct? A: Yes.

Q: And had you had any conversations with me prior to, I think it would be the 28th of May? I am thinking off the top of my head. We had to have you listed as a witness by June 5th, is that not correct?

A: I think so, yes.

Q: And I talked to you the week before; is that correct? A: Yes, sir.

Q: And you at that time—

MR. ROTH: Your Honor, I hate to interrupt—

MR. SCHOPPERT: We are laying a foundation.

MR. ROTH: I am objecting to the attorney leading the witness into what occurred on certain dates. I think objective questions could elicit the same information without the editorial leadership of Mr. Schoppert.

MR. SCHOPPERT: I am trying to lay a foundation, Your Honor, as to how I acquired the national archive material.

BY MR. SCHOPPERT:

Q: How did I acquire the national archival material? You know that Bradley excerpt, how did I acquire that? A: How did we acquire it?

Q: How did I acquire it? A: Oh, I pulled out a chapter of that document and showed it to you.

Q: And you gave me a Xeroxed copy? A: Yes.

MR. ROTH: Object to leading.

BY MR. SCHOPPERT:

Q: What did you do with it? What did you with the

copy you pulled out? A: I put it back in after they were Xeroxed.

Q: Did you hand me a copy of it? A: Yes.

Q: There has been some contentions in the depositions by some of the witnesses that the Citizens Rights Organization and the Big Horn Rod and Gun Club, some of those gentlemen have never seen a Crow fish in any of the rivers or streams on the Crow Reservation. What do you have to say about that from your own personal knowledge? A: There is considerable fishing going on by the Crows over the years, but they do it rather quietly and you don't see them.

Q: Your Tribe has never, to your knowledge, required a permit to be issued to a tribal member to hunt or fish, has it? A: No, sir.

Q: Are you aware of any time, any specific instances, of when Crows fished? Do you fish? A: Yes.

Q: Does your family fish? A: My son does.

Q: Did you fish, say, when you were a young boy? A: Oh, yes, I fished all my life.

Q: Do you find anything unusual for — was it the younger people that fished or was it the older people or what age group fished primarily over the years? A: I would say all age groups. We started in when we were kids. Fished for bullheads and small fish.

Q: Do you know if anyone on the reservation since you have been alive has ever commercially fished for profit? A: No, sir.

Q: Most of the fish, then, that were caught, I suppose, were consumed for personal use? A: Yes, sir.

Q: There has been an assertion made by the state, and I draw your attention to the Government's three exhibits, 92, 93, 94, of the State of Montana, and have you had a chance to look these exhibits over

last night? They are out of the extracts of the Sanderson Report before the Court of Claims Commission. Are you familiar, Joe, with the contents of that?

A: Yes, sir.

Q: They make reference in that report, and I am paraphrasing, that the Crow Tribe participated in the slaughter of the buffalo from the period of about 1870 to 1880. Do you know or have any knowledge of that particular theory or why that was done or if it was done? A: As I recall this particular writer stated that the Indians were quite wasteful and destructive of the buffalo herds; that they would kill wantonly, and if left along, they would have exterminated the buffalo themselves within 50 years. I read that, yes.

Q: Would you say that that is wholly accurate? A: Perhaps it would be possible at a particular time when the Crows were required to kill more buffalo than they actually needed or they were accustomed to killing because of a drought the previous year where they didn't have the time or the opportunity to make new teepees, and their teepee covers have gotten old, that they want to cure new teepees. And also along the same line, their clothing, their equipment, would also become old and they would need new buffalo hides, and perhaps they had an idea that the following winter is going to be a tough one and they better get lots of meat. At a particular time they would kill more buffalos than what others might consider necessary.

Q: Have you recognized a tribal ethic in hunting game, an ethic of hunting? A: Yes. Ordinarily they would hunt and procure fish, only that amount that would sustain them for a period of time. They would regard these animals of the forest as their gift from the Great Spirit through their mother earth and they

would not exploit these gifts.

Q: What would a Crow's peer group pressure be if he wasted or laid to waste a whole string of game animals, let's say? How would the tribal members view that? A: Then or now?

Q: Both times. A: At that time hunting was well regulated by the police. One of the military clubs would be asked to police the tribe for months or even a year.

Q: Can you stop right there for a minute, Joe. To make no confusion on the record, when you mean police, you mean police in our sense of the term, but what were these — were these tribal police or bureau police? A: Tribal police.

Q: They weren't police with a badge, though, is what I am driving at. A: No. They would control hunting and they would enforce safety measures during a migration or during a caravan and they would patrol activities within the Tribe in camp. These were Indian police.

Q: Presently what would their views be? A: Presently we don't have game ordinances and we still operate on the concept that young hunters would be careful in their hunting; that they would restrain themselves. We leave it up to them.

Q: There are no doubt exceptions to that rule, though, in all fairness? A: Yes.

Q: The Crows have never — did the Crows have court systems, say around the period of 1868? How did they enforce their norms against the people? Was there a system? A: Well, the organization I referred to as the police force would obey the demands of the caravan chief, or the head man of the hunt, and also of a band chief. They controlled everything in that manner. If someone has abused their regulation or violated a hunting law, that the police people would

immediately confiscate that man's equipment, hunting equipment, his horses, or even flog him.

So justice was meted out quickly in those days.

Q: I take it, then, the Crows have traditionally been under a superintendent's court, the Bureau of Indian Affairs Court, that is really not their own? A: When the agent was assigned to the Crows in 1870, he was directly responsible to the Commissioner of Indian Affairs. Then his word was the law until 1884 when the secretary's regulations were given to him to enforce. Then again in 1903 the secretary's 1884 regulations were modified, and the Crows operated under that system until 1934 when law and order codes were revised, and we have been operating under that system until now.

Q: Are you familiar with the Bighorn River? A: Yes, sir.

Q: Are you familiar with the construction of Yellowtail Dam? A: Yes, sir.

Q: Are you familiar with the fishing in the Bighorn River prior to Yellowtail Dam? A: Yes, sir.

Q: Did Crows fish in that river? A: Yes, sir.

Q: And for what type of fish? A: Bullheads, catfish, sturgeon, pike, ling, trout, suckers.

Q: How about on some of the other streams in the reservation? A: The smaller streams like Pass Creek, Little Bighorn, Lodge Grass Creek, East Pryor Creek, Dry Head Creek, Lost Creek, Crowder Creek, all contain trout because these streams emanated out of the Big Horn Mountains and Pryor Mountains.

Q: Are you familiar with what happened to the fishery--fishing in the Bighorn after the dam was built? A: Yes.

Q: Would it be accurate to say Indians fished in

the river after the dam was built? A: Yes. Oh, yes.

Q: How about you, did you ever do that? A: Not lately.

Q: From your perusal or your research of the Crow Tribal records or documents, have you ever found an instance where the Crow Tribe authorized the State of Montana to stock game in the rivers and streams of the reservation? A: No, sir.

Q: Are you familiar with and could you relate to us how the buffalo came to be in the mountain area of the reservation? A: Yes, sir.

Q: How about on some of the other streams in the reservation? A: The smaller streams like Pass Creek, Little Bighorn, Lodge Grass Creek, East Pryor Creek, Dry Head Creek, Lost Creek, Crowder Creek, all contain trout because these streams emanated out of the Big Horn Mountains and Pryor Mountains.

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Q: From your perusal or your research of the Crow Tribal records or documents, have you ever found an instance where the Crow Tribe authorized the State of Montana to stock game in the rivers and streams of the reservation? A: No, sir.

Q: Are you familiar with and could you relate to us how the buffalo came to be in the mountain area of the reservation? A: Yes, sir.

Q: How did that happen? A: About 1936 or '37, shortly after Mr. Robert Yellowtail was appointed superintendent, that he started to move them to

replant the mountain area with buffalo. And he made arrangements with Yellowstone Park and bison range in South Dakota and also with the bison range in western part of the state to bring some cows and some bulls to the mountain area.

Q: Did he also about that period of time stock that area with some elk? A: Yes, they even brought some elk, too.

Q: Do you remember where they got the elk? A: Yellowstone Park.

Q: About how long, to your knowledge, have the Crows had a game warden system, of men who are tribal members who acted as game wardens? A: I would say about 1930.

Q: Do you remember what their duties were or where they patrolled basically? A: After the buffalo were brought in, they placed Chief Buffalo Rider, as he was called, there at the mountains and he had some helpers and they watched the buffalo herd more than any other game. And it was not until recent years that they started patrolling the Bighorn River.

Q: Do the Crows—did they ever utilize game birds or hunt for birds? A: Yes.

Q: Did they ever—how would they do that? A: Prior to 1930, prior to the great depression, there were many, many, many prairie chickens and sage hens on the Crow Indian Reservation, and Indian people killed these birds to supplement their diets. They depended a great deal on game birds.

Q: How about waterfowl or geese or ducks? A: Not so much as that, but they will eat ducks.

Q: Also, I draw your attention to Exhibit No. 93 from the Sanderson Report. I draw your attention to the first paragraph, and I believe it is on page 110, up in the upper right-hand corner. I have it un-

derlined in red. I quote from the article. "All the Indian tribes to the vast region—Sioux, Cheyennes, and Crows, Blackfeet, Piegans, Assiniboines, Gros Ventres and Shoshones—found their most profitable business in and greatest pleasures, next to scalping white settlers, in hunting the buffalo." Do you find anything strange about that statement? I am referring to the scalping of the white settlers. Is it proper to classify the Crows that way? A: The Crow Indians would scalp Sioux and Cheyennes, but would not scalp Caucasians because the Caucasians were not included in the winning of wars. Also, killing Caucasians was not an honor, so they desisted from that. However, the Sioux will scalp white men.

Q: Through your analysis of the oral traditions of the Tribe and also written documents, isn't it a historical fact that the Crow Tribe has been very peaceful with the United States of America? A: Yes. All throughout the early reports of traders, trappers, mountain men, that they would refer to the Crows as friend of the white man. Whenever they are in trouble with the other tribes, they would retreat to the nearest Crow camp for protection.

Q: Did the Crows go to war as such with the United States of America? A: No.

BY MR. SCHOPPERT:

MR. SCHOPPERT: One last line of questions, Your Honor.

Q: Joe, you made reference to when the Crow Tribe finally came into this particular area and settled. Were the other tribes permanent residents of this area or did they come in to raid the Crows? A: The other tribes came in much later. I would say the Crows came into this area about 1700, turn of the 18th century, and the other tribes started coming in much later, 1850, even as late as 1850.

Q: That would be the Blackfeet— A. Blackfeet came first.

Q: Flatheads possibly? A: Assiniboines, Northern Crees, Cheyennes, they came much later, at least 50, 60, 100 years later than the Crows.

Q: How about the Shoshone? A: Shoshone went back and never came back. Went back to plateau country and never been back since.

Q: So they didn't—when the Crows got here they didn't resist the Crows coming, they just left? A: No.

MR. SCHOPPERT: No further questions.

THE COURT: Any cross?

MR. ROTH: Do you want to start cross or is this a good time for recess?

THE COURT: We will take a recess about 15 minutes.

(Recess.)

MR. CARROLL: Your Honor, may I be excused from the courtroom for about five minutes? Something has just come up and I have to make a phone call.

THE COURT: Do you have any objection?

MR. ROTH: No objection, Your Honor.

CROSS-EXAMINATION

BY MR. ROTH:

Q: Mr. Medicine Crow, Mr. Schoppert has been addressing you as Joe. For brevity do you object if I also address you as Joe?

A. No, Sir.

Q: Thank you. With regard to your education, as I understand it, to sort of make a synopsis of that, you went through eight years of elementary school, graduated from a school off the reservation; is that correct? A: Seven years elementary school in Crow

Indian Reservation. One year of elementary school in Oklahoma.

Q: Then as I understand it, you then went to high school outside the reservation; is that correct? A: Yes, in Oklahoma.

Q: And then you pursued a college education at what college was that? A: First Bacone College in Muskogee, Oklahoma. Then Linfield College in the State of Oregon. And University of Southern California at Los Angeles.

Q: Approximately in 1938, was it, that you commenced working on a Master's Degree or was it 1937? A: The Fall of—no, '39.

Q: In '39 that you commenced working on the Master's Degree? A: Go back. Fall of '38. I received the degree in '39.

Q: Did you write a Master's thesis? A: Yes, sir.

Q: And that has been published, has it not? A: Not on a commercial basis, but available in public libraries.

Q: Yes, it is an academic publication, isn't that true? A: Yes.

Q: Now, subsequently as I understand it, then, you pursued your Doctor of Philosophy Degree for approximately two years. Have you recently, say, reinstituted an effort to get your Ph.D Degree? A: 'yes, sir.

Q: And I believe you worked on your Ph.D from 1939 to 1941; is that correct? A: Yes, sir.

Q: Now, Mr. Schoppert went through your knowledge of the Crow language. As I understand it, there was a word for fish which was Bua. A: Bua.

Q: A word for elk, trout, ling, and apparently a phrase which literally interpreted meant "to snare fish"; is that correct? A: Yes, sir.

Q: And the way I would pronounce that would be Bua-chi-la-chio? A: Yes, sir.

Q: Now, as I understand it, the language as far as those words of the Crow or Absarokee vocabulary existed approximately in that way for at least 100 years; is that correct? A: Yes, sir.

Q: So that words similar to those or identical to those, perhaps, existed in 1851; isn't that true? A: Yes, sir.

Q; And words existed that would be nearly identical to those in 1868; isn't that true? A: Yes, sir.

Q: Now, in addition, the Crow or Absarokee, as I guess they were known at one time, and excuse my pronunciation of that term, had a vocabulary that encompassed words like government or something similar to that, or council, did they? A: Yes.

Q: And duties and rights, were they also the subject of vocabulary words in the Crow language? A: Yes, sir.

:Q Would the word "privileges" also have its Absarokee counterpart? A: The word "privilege"?

Q: Would the word "privileges" also have its Absarokee counterpart? A: The word "privilege"?

Q : Yes. A: Yes.

Q: And isn't it true, Joe, that the Crow vocabulary distinguished between a right and a privilege? A: I think so.

Q: And those words were part of the vocabulary both in 1951 and 1868; isn't that true? A: Yes, I would say.

Q: Now, as I understand it, you have made a study both as an academic scholar and as tribal historian to review all of the laws, I guess it was, and the treaties, that dealt with the Crow Nation; is that correct? A: Yes, sir.

Q: And would you tell me when that study commenced? A: It commenced about 1938 when I went to Linfield College.

Q: And have you continued that study up to the present time? A: Yes. Yes, sir.

Q: And may I assume that early in your study you became aware of the fact that certain records were available and let's say many times only available in the government archives in Washington, D.C.? A: Yes.

Q: And may I also assume that early in your academic career, you became so sophisticated in and quite learned in the method of using the government archives as a research source? A: I DON'T KNOW WHAT YOU MEAN BY SOPHISTICATED—

Q: Experienced. A: I do my best to get the facts. Call for relevant material that I was looking for.

Q: With regard to compiling the history of laws, and particularly those that deal with hunting and fishing and the archives material that deals with hunting and fishing, when did you commence that particular search? A: About 1938, while I was still in college.

Q: And did you since 1938 acquire archive materials that deal with communications between the Superintendent of the Reservation and Commissioner of Indian Affairs?A: Yes, sir.

Q: And when did you commence to compile that information? A: About 1948.

Q: And would you have gone back to Washington, D.C., or would you have written back to the archives or some manner communicated by mail? Was it a personal visit or was it— A: At that time the old documents of the agents and superintendents were still at Crow Agency for inspection there. They were easily available.

Q: Did you make copies of the letters between the commissioner and the superintendent of letters that dealt— A: I have copies for certain years. For instance, I have copies for the year 1870, '71 and part of '72, an annual report of Agent Peas.

Q: Do you have any that go into the 1900's? A: Beginning 1931, I have available on my desk copies of letters from the superintendent, copies of letters from inspectors, copies of reports from Washington, D.C., to the field and all sorts of documents.

Q: And when you refer to your desk, are you referring to your desk which is in your office on tribal country? A: Yes.

Q :And is it a desk furnished to you in your capacity as a tribal employee? A: Yes. Tribal Historian, for Education Director.

Q: And would you tell me whether or not these letters that you are referring to and the annual reports that date back into the 1870's, if they were acquired prior to 1951? A: They were acquired in 1968, '69, in that area.

Q: So that following your resume, all of these documents were available at the inception of this lawsuit, then, were they not? A: They were available what?

Q: At the commencement of this lawsuit, all of those documents were available in your desk on tribal property? A: This particular case?

Q: Yes, since this case started. A: Yes.

Q: They were available. I see. May I also assume that your research and your gathering of material spanned the year 1913 up to the present time? Do you keep abreast of those things right up to the present time? A: The records are there. I would look at them from time to time to refresh my memory, et cetera, yes, sir.

Q: So that you basically have communications or copies of communications between, say, the Superintendent of the Reservation and the Commissioner of Indian Affairs, perhaps solicitor's letters, things of that nature, things that span the time period from the turn of the century up to the present time. Would that be a present synopsis of what you have available? A: Sufficiently, yes.

Q: Thank you. Now, you have indicated that the vocabulary of your tribe included various words that related to hunting and fishing rights and privileges. With regard to the Treaty of Fort Laramie of 1851, which you indicated you had some familiarity with, having researched it, there appears to be only one reference in that document to hunting and fishing, and that appears on the last paragraph of Article 5, and I will read it to you. "It is, however, understood that in making this recognition and acknowledgement, the aforesaid Indian Nations do not hereby abandom or prejudice any rights or claims they may have to other lands;" then there is a semicolon, "and, further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Now, basically the salient provisions of that article could be interpreted into the Crow language. For example, the word "privileges", its counterpart in the Crow language. Hunting and fishing had their counterparts in the Crow language, did they not? A: They could be expressed properly translated.

Q: As I understand it, going back to your previous testimony, there was a difference in the Absarokee language between a "right" as opposed to a "privilege"; is that not true? A: Yes.

Q: Thank you. We then come to the treaty with the Crows dated 1868 which, again, I believe you

stated you have some familiarity with; is that correct? A: Yes, sir.

Q: And again I may be wrong, but I believe that the only reference in that treaty to hunting and fishing is contained in Article 4. And I will read it to you. "The Indians hereby named agree when the agency house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon and as long as peace subsists among the whites and Indians on the borders of the hunting districts." To your knowledge is that the only reference to hunting or fishing in the Treaty of 1868? A: Yes, sir.

Q: Now, as a result of the Treaty of 1868, as I understand it, there was some 30 million acres of land which were ceded to the United States; is that correct? A: 1851 Treaty yes, reserved 38 million acres for the use of the Crow Indians.

Q: And the Treaty of 1868 basically reserved a reservation of approximately eight million acres to the tribe; is that correct? A: Yes, sir.

Q: Which resulted basically in a cession to the United States of 30 million acres approximately; is that correct? A: A loss of about 30 million, yes, sir.

Q: Now, with regard to the land that was lost, there has been basically compensation for that in the form of a claim against the United States in compensation; is that not true? A: Yes, sir.

Q: And so far as you know, and based upon your research into tribal records, that sort of thing, all of the constituent elements of value, or all of the resources—

MR. SCHOPPORT: Object. This is beyond the scope of direct examination.

THE COURT: I haven't heard the question yet. You may continue.

BY MR. ROTH:

Q: All of the constituent elements of value and all of the resources that are connected with those 30 million acres of land basically have been paid for and passed out of the hand of the Crow; isn't that true?

MR. SCHOPPERT: I object. That calls for a legal conclusion and also is not a part of direct examination as to compensation paid by obviously Court of Claims cases.

THE COURT: Well, its is beyond the scope of the direct except he is a qualified historian and if he can answer the question of his own knowledge, I think probably he can answer it. If you know the answer.

BY MR. ROTH:

Q: Do you recall the question? A: Repeat that again, please.

Q: I say—let's go back just a bit. Have you read the records and testimony and the papers that constitute the case that the Crow Tribe filed against the United States of America to obtain additional compensation for the 30 million acres of land which they lost or was ceded to the United States as a result of the difference of land descriptions between the Treaties of 1851 and 1868? A: I would not use the word additional compensation, but initial compensation, because they were never paid between 1851 and 1868? A: I would not use the word additional compensation, but initial compensation, because they were never paid between 1851 and 1868.

As to the second part of your question, the com-

pensation was based on the historical appraisal based on a fair market value at the time of the taking in 1868, and it was not an accurate type of appraisal, historical in nature; that it did not differentiate farmland, tillable farmland, or prospective possible farmland, or future possible irrigated land. It lumped the classifications of land into one classification, open range land.

Q: May I interrupt just a moment? A: Yes, sir.

Q: From what you have indicated in your testimony, I believe responding to the question that I actually asked, which was whether or not you were familiar with those records, apparently you are familiar with those Court of Claims records; is that true? A: Appreciably so, yes.

Q: And as a result of that case, isn't it true, Joe, that the Crow Tribe was fully compensated, as far as that case is concerned, for all of the constituent elements of value that are inherent in that 30 million acres of land that passed—the total to which passed to the United States?

MR. SCHOPPERT: I will renew my objection there, your Honor.

THE COURT: Overrulled.

THE WITNESS: As I answered, there was no differentiation made of the various aspects of the value of the land, whether it is actual farmland or grazing land, but sort of a lump payment, which averaged out less than a dollar an acre, maybe 50 cents, 60 cents an acre, I have forgotten. And that was discounted for the rations that were given to the Crows. So actually we probably received compensation in monetary expression of, say, five cents an acre.

BY MR. ROTH:

Q: What I am getting at, though, is that that payment was to constitute payment for all of the constituent elements of the land, wasn't it? They were all lumped together, weren't they? A: Yes.

MR. SCHOPPERT: I object to that line of questioning, too.

BY MR. ROTH:

Q: Your answer was yes?

MR. SCHOPPERT: Your Honor, I object to that particular question as calling for a legal conclusion.

THE COURT: Again, if you don't know the answer, if you don't understand his questions, please say so. I think you understand it. We are not going to—this isn't the Court of Claims. So we are not opening up any land values. All he is asking is whether or not you know whether or not in the court case, the Court of Claims, that these were all taken into consideration.

THE WITNESS: Yes, they were compensated.

BY MR. ROTH:

Q: Thank you. Now, let's go to the Act of 1882. Now, that was a cession agreement, wasn't it? A: Yes, sir.

Q: And the Tribe agreed to that, did they not? A: Eventually, yes, sir.

Q: And as a result of that sale, again all of the constituent values of the land were ceded to the United States, weren't they? A: I would say all physical values.

Q: All right. May I ask you what the restriction to physical means? A: Minerals, trees, grassland and those elements of nature that are perceptible with the five senses.

Q: Fish and game? A: Fish and game, I suppose.

Q: With regard to that cession of land, there was no retention of political control over the land ceded, was there, by the Crow Tribe? A: Probably not.

Q: And was the next Cession Act in about 1896? A: I thought it was in the 80's. Maybe not.

Q: I am sorry. I was trying to keep track of your testimony and I am not that conversant with it.

At any rate, in regard to the next Cession Act, basically would the effect of that Cession Act be precisely the same as the effect of the 1882 Act? A: Yes.

Q: All right. Going to the Act of 1904, by which another large section of land was ceded to the United States and they were to sell it for the Indians and hold the money in trust; is that correct? A: That's correct.

Q: That is a simplification of really what was agreed to.

All right. Again, the United States obtained the consent of the Tribe, did they not? A: No. An agreement was held first and the agreement was duly signed in 1893. Then it laid dormant until 1904 when the legislation was introduced and the terms were unilaterally made by Congressmen, which completely changed the terms of the agreement.

Q: We—there was an abrogation of the treaty by the Act of 1904, wasn't there, because it was unilateral?

MR. SCHOPPERT: I object, your honor.

THE COURT: Just a minute.

MR. CARROLL: That clearly calls for a legal conclusion.

THE COURT: I think it does, also. Let's get on with the Acts, what happened.

MR. ROTH: May I pursue this witness's understanding what occurred because he did treat the subject?

THE COURT: Yes.

MR. ROTH: Thank you.

BY MR. ROTH:

Q: As far as following your testimony, Joe, and correct me if I am wrong, as I understand it, your understanding of the 1904 Act was that Congress unilaterally imposed that particular cession agreement upon the Crow; is that your interpretation of that? A: 80 percent, yes. A case in point would be, it was agreed that the Tribe would be paid $5 per acre for the million and a half acres, thereabouts, taken. However, when the bill was enacted into legislation, that portion was deleted and the government would act as a real estate agent in the selling of the lands and the income therefrom would be put into the Treasury of the United States for the use of the Crow Tribe. This is a case in point.

Q: Right. And then with regard to the Allotment Act of 1920, as I understand your testimony, there was a delegation of Crow Tribal members who actually went to Washington and supported that legislation; isn't that true? A: Yes, sir.

Q: And among the reasons that they gave to Congress for supporting that legislation was so that the surplus land which would be alloted to various tribal members as a result of that Act could be sold to non-tribal members and they could be invited onto the reservation and by such invitation, and the close association between Indian and non-Indian, the Indian would profit from it, perhaps the non-Indian would profit from it, and better relations could exist between the Indian and the non-Indian. Doesn't that sort of synopsize some of the remarks made by some

of the Indian delegation to Congress in support of the Act? A: On the contrary, sir, Section 2 of that 1920 Act prohibited the acquisition of 1280 acres of land from Indians by non-Indians, either as individuals, partnership or corporation. There is an acreage limitation of Indian lands which they may acquire.

Q: May I interrupt for just a moment? A: Yes, sir.

Q: Joe, isn't that a restriction on the amount of land that a single non-member may own as opposed to a restriction as to the total amount of allotted land that could ultimately pass into non-Indian hands? A: Individuals, corporations, partnerships.

Q: Am I not correct, Joe, in saying that an inhibition placed upon a single individual, not upon the gross acerage that could pass out of Indian hands into non-Indian hands as a result of that legislation? A: I think the ultimate idea is to preserve the reservation for Indian use as much as possible because of the Indian's keen awareness of attempts made from time after time in separating theCrow Indian from his reservation.

Q: Joe, is it true or is it not true that a Crow delegation went to Congress and supported the Crow Allotment Act of 1920? A: True and not true.

Q: And isn't it true, Joe, as a matter of fact they pleaded with Congress to give them the right to allot that land so that they would have the right individually to dispose of it basically as free men without too many government restrictions? Isn't that correct? A: The delegation was divided. Some wanted allotments, some did not want allotments.

Q: With regard to the Act of 1920, the only land that was actually reserved for tribal use was the

so-called mountain area and approximately 4000 acres and then here and there various Indian communities that had been established; is that correct? A: Much more than 4000 acres.

Q: I am sorry, 400,000 acres. A: 400,000 acres.

Q: I am sorry. A: And what they call recreation trust consisting of 40 acres located in the various districts or Indian communities, yes.

Q: Now, as a result of that Act of 1920, isn't it true, Joe, that almost all of the land, and perhaps I would be correct in saying all of the land below the take area of the Yellowtail Dam, which is riparian to the Bighorn River, has been allotted? A: You mean downstream from the dam?

Q: Yes. A: Yes, from the so-called Afterbay down is all allotted.

Q: And none of that land, riparian to the river, was reserved for purely tribal uses, was it? A: There is one tract so designated as a recreation area where the Indians had a dancehall and a racetrack and they still use that area for social activities.
How large of an acerage is that tract? A: Generally there are 40 acres for each district.

Q: Now, theoretically, isn't it true, Joe, under the Allotment Act of 1920, every single piece of land riparian to the Bighorn River below the take area of Yellowtail Dam ultimately could end up in non-Indian hands? A: Yes, theoretically.

MR. SCHOPPORT: I object to that line of questioning as theoretical and speculative.

THE COURT: Well, if they are all allotted, they can be sold. Is that what you are saying?

MR. ROTH: Yes. And the witness answered yes.

BY MR. ROTH:

Q: Now, in the Allotment Act of 1920, to your knowledge, Joe, is there any reference to fishing or hunting or reserving any hunting or fishing privileges or rights on any land allotted or which ultimately would end up in a fee simple title in a non-member? Is there anything in that legislation which addresses that question? A: Not specifically, but so long as that tract is within the exterior boundaries of the reservation, it is subject to certain restrictions involved in a trust relationship with the United States and the Tribe.

Q: Yes, I understand this is true so long as the fee is held by the United States in trust for the Tribe or for an allotted member. But not after the fee has passed into non-Indian hands; isn't that true, Joe? A: It is a general conception so long as that land is within the reservation, it is still a part of the reservation, and that we could still go hunting and fishing in that white man's land.

Q: Does that same concept say that the white man cannot hunt or fish on his own land, even though he has a fee title to it? A: I guess, although it doesn't spell it out the exact bundle of rights that the man acquires after he purchases the land, it is implied that he can hunt and fish or regulate such activities on his own fee land.

Q: Sure. And that was the concept that the Crow Tribe operated on since 1920, isn't it, Joe, that a

man who owned the fee to his land had the right to regulate its use; isn't that right? A: Yes, I guess it is implied that way.

Q: There was no government representation made to the Tribe that in any way implied anything different, was there, Joe? A: I am not familiar with that area.

Q: Let's go to the aboriginal history of the Tribe, or I should say the history of the Tribe. Being an anthropologist, Joe, what does the word "aboriginal" mean? A: It means that it is native to that particular area before any other government had appeared and wanted to take over. It was there from time immemorial.

Q: Right. Aboriginal and the phrase "it was there from time immemorial" are sort of used interchangeably, aren't they? A: Sometimes, yes.

Q: And with regard to the Crow Tribal roots, as I understand it, they commenced in the area of Winnipeg, Canada, in approximately 1550. The Tribe migrated into the Dakotas, ultimately camped along the Missouri, and about the start of the 17th century commenced a northward-westward trek that took them into, I guess, would be northwestern Canada. Then they migrated south again over to the Salt Lake area. And then ultimately at about the start of the 18th century, or 1700, they located in a semi-permanent status within the area they occupied about 1851; is that correct? A: That is true, as far as known history is concerned.

Q: Isn't is true, Joe, that the prehistoric tribes that Mr. Schoppert referred to in his examination of

you that existed in this area 8 to 10,000 years ago, that you cannot find any anthropological or archaeological link between them and the Crow Tribe of the 20th century? A: Not at this point.

Q: So that about the time that the Crow Tribe commenced migrating into this area and occupying it, it was more or less contemporaneously with the colonial period of the eastern seaboard as far as the United States is concerned; is that correct? A: Yes, probably 1550 that trek was made.

Q: Did the Crows enter into any treaties with the Indians that occupied the area or did they take it by storm? How did they divest the occupants of this abundant and fruitful area of the occupancy of the area? A: The so-called sheep eaters and some Shoshone Tribes were here. But they didn't offer too much resistance. And a band of Flatheads were on this side of the Rocky Mountains. They didn't offer much resistance. They went back over the mountains.

So this area was more or less discovered by the Crows according to the prophecy of a man who led the exodus back in 1550, and about 1600 he moved again.

Q: Isn't it true, Joe, that the Sioux used this particular area for hunting grounds prior to the time that the Crow moved into it? A: No, sir, they came much later than we did.

Q: And isn't it true that the northern tribes, such as the Flathead and the Kalispell, used it for hunting grounds before you moved into the area? A: Yes. The Flatheads and Kalispells would venture across the Rocky Mountains to the eastern slopes as hunters.

Q: In 1868, do you know what the population of the Crow Tribe was? A: I can guess. In 1843 a census taken by Chief Long Hair, which placed the population from 8 to 10,000 living and 1044 teepees. And smallpox hit the Tribe several times up to 1868. By that time I would say the population of the Crow Tribe was 4000, 5000.

Q: And at the time—in 1868, from 1850, or perhaps prior to 1850, to 1868, is when some of these other tribes were beginning to put pressures on the Crow Tribe; is that correct? A: Pressure started coming in noticeable from after the Treaty of 1851.

Q: And the Sioux was a large and powerful nation, was it not? A: Yes, mostly from the Sioux and Cheyenne we were pushed out of the Black Hills area.

Q: Did the Sioux and the Cheyenne outnumber the Crow? A: Oh, yes.

Q: Now, I believe you stated that the Crow, when they settled in this area, were of the buffalo culture; is that correct? A: By the time they settled, yes.

Q: And the buffalo basically was the center of their economy and actually played a large part in their tribal religion and rituals; isn't that true? A: Yes, sir.

Q: As a matter of fact they depended upon the buffalo for clothing and shelter and food and utensils and any number of different things; isn't that true? A: Yes, sir.

Q: And at that time game was very abundant and

particularly the buffalo was very abundant; isn't that true? A: Yes, sir.

Q: Joe, would you agree with a statement—strike that, please.

MR. ROTH: Your Honor, you have not ruled upon the admission of these documents that are offered by the United States.

THE COURT: Which?

MR. ROTH: Exhibits 5 through 28. I think you reserved objection because they withheld them from us.

MR. SCHOPPERT: I object to that.

MR. CARROLL: I did not withhold the documents.

MR. ROTH: I apologize. I withdraw the statement. I apologize for the word "withheld" particularly with reference to Mr. Carroll.

THE COURT: Just to solve the problem, the Court did over the noon hour consider the objections. I think there is probative value in the documents. Therefore, No. 5 through 27, at least at this point, will be admitted over objection.

I believe 28 was a letter dated February 6th, 1976, and I have not—I don't recall anyway, any discussion relative to that. But the other ones will be received.

(Whereupon, United States' Exhibits Nos. 5 through 27 were received into evidence.)

BY MR. ROTH:

Q: Mr. Medicine Crow, would you look over this bundle of documents just as rapidly as you can and see if you recognize those documents?

MR. SCHOPPERT: May I be excused for a few

minutes, please, Your Honor?

THE COURT: Yes.

Would it be helpful if we took a recess?

MR. ROTH: I just wondered if he had seen them.

THE WITNESS: I have seen this first one here or a letter similar to that.

BY MR. ROTH:

Q: Does it appear that the rest of that...A: Yes, these are the type of letters, documents, that transpired back and forth between Crow Agency and Washington, D.C.

Q: These are the type of documents and perhaps copies of these very documents are the ones that you compiled up to about 1968; is that correct? A: I think I would say yes.

Q: Now, Joe, would you agree with this statement that appears in a letter dated July 8, 1913, to the Commissioner of Indian Affairs, from probably—well, from Crow Agency, Montana, anyway, and I quote. "The Indians do not fish. Consequently do not suffer loss if fish are taken from the streams." A: Yes, I have seen that letter. I have forgotten which agent wrote that, but he was new and apparently never seen Indians fish. So he made that remark as was made in the 1920's.

Q: As a matter of fact, the same type of comment is contained in a letter in 1923; isn't that true? A: About, yes.

Q: Now, getting to the Wheeler-Howard Act of 1934, the Crow Tribe rejected that Act, as I understand it, until about 1948; is that correct? Is that your testimony? Or the application of the Act? A: Rejected it completely in '33.

Q: And then apparently did they ever organize under it? A: Oh, the 1948 references to the adoption

of a Constitution and By-laws.

Q: Yes. So in 1948 is the first time they, let's say, adopted their own government to the Indian Reorganization Act; is that correct? A: Not the total government; just council proceedings, quorum, et cetera.

Q: Now, in researching the history of the Crow Tribe may I assume, and in commenting about game wardens and that sort of thing, may I assume that you went back through tribal records to determine what sort of regulatory efforts they made with regard to the non-Indian on the reservation? A: The records since 1930 indicatd clearly that the Crows did not want and never allowed hunting of big game on the reservation. They always succeeded in doing that. However, fishing has been controversial back and forth, back and forth. Sometimes some tribal leaders would say, okay, let them fish. Some would say, no. So it is kind of a political football. Even the agents were involved in that.

Q: You spoke to the question, I believe, of tribal courts and a court system set up under government regulations under the B.I.A.; is that correct, or am I misstating your testimony? A: Yes, in 1934 the Federal Indian Code of Criminal Offense for Indian Court System, there is an exact title, but I have forgotten, but it was accepted by the Crows and we have operated under those codes ever since then to this time. We haven't changed it yet. We made some attempts, but we are still under that. Also, that and some Federal regulations in Title 20, in Title 18 even, where hunting in the reservation by non-Indians have been spelled out and several men have been prosecuted for hunting big game in the Big Horn Mountains, deer, elk, buffalo.

Q: To your knowledge, Joe, based upon your

research of the Crow Tribal records and the history of the Crow Tribe, to your knowledge has there ever been a non-Indian prosecuted for hunting or fishing within the original boundaries of the reservation on fee patented land? A: By the Indians?

Q: By the Indians or the United States Government.

MR. SCHOPPERT: I am going to object to this, Your Honor.

THE COURT: Just a minute.

MR. SCHOPPERT: This line of questioning—this is not really a case in controversy in this particular lawsuit, law enforcement. We posited that in our trial brief and outlined the parameters of that. We have posited in our brief that law enforcement is not really a part of this lawsuit. It is injunctive and declaratory relief to exclude from the treaty route. This line of questioning is not relevant nor is this really part of the case in controversy in this particular lawsuit. We would like to posit that objection.

THE COURT: What do you intend to prove by this?

MR. ROTH: I am not being facetious, do I really have to respond to that objection? I think it is self-evident that one of the factual issues in this case is whether or not there has been any regulations of non-member hunting and fishing activity on fee patented land within the reservation.

One of the issues in the case and one of the contentions of the Tribe is this case is they have, one, the exclusive right to control hunting and fishing under 7-05 which is an ordinance that they enacted within the reservation boundaries. One of the provisions of that ordinance proscribes all hunting and fishing by non-members within all of the reservation boun-

daries, not just non-fee land.

They purport to punish violators of that ordinance with imprisonment and fines and various other types of sanctions. I submit that when they are predicating their case upon the right to regulate under that kind of ordinance, that surely based upon Oliphant, the notions of the day, and Puwala, where the Court took cognizance of the fact that there was pervasive state control over non-Indian fishing activity within the reservation, and that non-members fished without being stopped within the reservation based upon the fact that those cases looked upon such evidence as relevant, surely with the plaintiff focusing directly upon that issue in this case in their own complaint and in their Motions for Summary Judgment, that I can inquire of this witness whether or not it was actually enforced on fee patented non-Indian land.

MR. SCHOPPERT: If I might respond for just a minute, I think Mr. Roth should read the complaint again. This is a suit against the State of Montana by the United States Government. The Crow Tribe is an intervenor. It is a civil action, not criminal action. It is trying to prevent them from doing certain acts.

THE COURT: Yes, I am aware of what the complaint says. I think I will overrule the objection, but only taking to the point if he knows. I am not going to get into speculation.

MR. ROTH: I believe the witness answered the question.

BY MR. ROTH:

Q: As a matter of fact, Mr. Medicine Crow, in your research of the subject, and your review of court records and tribal records, isn't it a fact that you could find not even a single instance of where a non-member of the Tribe was prosecuted for hunting and

fishing on fee patented land within the reservation? A: As an individual I don't recall of any.

Q: That includes right up to the present time, doesn't it? A: Yes.

Q: Do you recall this statement, Joe, and I quote. "Though the streams were infested with trout and catfish, they were left to swim in peace for fishing was a dull way of obtaining food according to the Crow." A: Yes, I recall that.

Q: Do you recall who made that statement? A: I think it was in one of my writings while in college.

Q: As a matter of fact, that is an excerpt from your thesis presented to the faculty of the Department of Anthropology, University of Southern California, May 1939, entitled, "The Effects of European Culture Context Upon The Economic, Social and Religious Life of the Crow Indian"; is that correct? A: Yes.

:Q Now, you indicated apparently that fishing is still apparently—is it a major activity of the Crow Indian or a minor activity at the present time or what is it? A: It is a routine activity.

Q: Routine activity? A: Young kids fish all the time.

Q: Where do they fish? A: Many of those streams there. Lodge Grass Creek, Little Horn.

Q: Is that on tribal land or allotted land? A: Some of it, some it allotted.

Q: But apparently not on fee patented land to non-members. A: Oh, yes, they fish any place.

Q: Would you agree with this statement which is taken from a report of February 2, 1978, authorized by project leader of the Hardin Fishery Assistance Project, "Since relatively few Crow Indians actively engage in fishing, stocking of reservation waters

has been significantly reduced"? A: I think the United States Fish and Wildlife Service routinely stock their creeks and reservoirs, but there is no report of state people doing that in recent years that I know of.

Q: I say you do agree with the statement, "since relatively few Crow Indians actively engage in fishing:" that portion of the statement made February 2, 1978. A: Yes, if you compare it with the so-called sportsmen-fishermen.

Q: With regard to the legislation or the joint resolution that led to the taking of the Yellowtail Dam site, are you familiar with that? A: Somewhat, sir.

Q: Again, with reference to that legislation, there was Indian fishing and hunting "privilege" reserved in that legislation, wasn't there, on the Bighorn or the Yellowtail Dam area? A: During the negotiations, the matter of fishing and hunting had been brought up a number of times by various members of the tribe, and—

Q: Excuse me. My question—I object to the responsiveness of the question and ask the answer to stricken because I think my question was much narrower than that.

Isn't it true that in the joint resolution in 1958, passed by Congress, which authorized the taking of the Yellowtail Dam site, that there was granted to the Indian a "privilege" to hunt and fish in the taken area without obtaining a fishing and hunting license? Isn't that true? A: I don't know about the exact wording, but that sort of an arrangement was made.

Q: Yes. At that time was the Crow Tribe represented by counsel? Did they have counsel? A: Oh, yes, I suppose.

Q: As a matter of fact, they probably had counsel

in Washington, D.C. assisting them in lobbying the legislation, didn't they? A: Probably.

Q: And it was probably the firm that is known at the present time as Wilkinson, Cragun and Barker that were your Washington Associates; isn't that correct?

MR. CARROLL: Objection, Your Honor.

THE COURT: Sustained.

MR. ROTH: Would it be appropriate to ask for a recess at this time?

THE COURT: Yes. We will be in recess for 15 minutes.

(Recess.)

MR. ROTH: Your Honor, I have used the recess to shorten my cross-examination and I announce that I have no more cross-examination at this time.

CROSS-EXAMINATION

BY MR. SEYKORA:

Q: Mr. Medicine Crow, can you hear me?
A: Yes, sir.

Q: If you can't, let me know. I have a short series of questions. We have discussed briefly, yourself and Mr. Roth, the buffalo culture. Approximately what time did that era end with the Crow Tribe? A: It ended about 1880.

Q: Just about that same time the general Allotment Act came into being and the Crow Tribe was then heading toward an agrarian type of economy; would that be a correct statement? A: Yes, sir.

Q: At that particular time and a few years thereafter, after the 1904 cession, the reservation was reduced to its present boundaries; is that correct? A: After 1904, yes.

Q: Are you familiar with the present-day boundaries? A: Yes, sir.

Q: Historically speaking within the confines of the present—what are generally known as the exterior boundaries of the reservation, were there any normal or accustomed places that members of the Crow Tribe would, on a daily and routine manner, obtain fish? A: On occasions, yes.

Q: On occasions, but not on a customary and practicing manner? A: Probably not.

Q: Now, the area, again I am speaking of the area within the exterior boundaries of the present-day reservation, are you familiar with what the native species of fish were in that area? A: About 1904, you mean?

Q: Any time, late 1880's and early 1900's. A: From stories that I have received from story tellers that there were always catfish, ling, and, of course, trout.

Q: Now, when you speak of trout, that can be refined further, can it not, to mean general native trout, or cutthroat trout? A: Yes. Cutthroat in them days.

Q: Now, the species known as the brown trout and the other known as the rainbow trout, they were not native to the area, were they? A: No, sir.

Q: How did they become abundant in the area, do you know? A: I think brown trout ate up the good trout, the native cutthroats. After they were introduced, these wonderful cutthroat native trouts disappeared faster and faster.

Q: You indicated they were introduced. They were actually planted, were they not? A: Yes, they were planted.

Q: Both species, the rainbow and the brown. That

is with regard to fishing of the exterior boundaries of the reservation.

Were there upland game birds of the Crow Indian Reservation as it now exists? A: They planted golden pheasant about 1922, '24, in the Hardin area.

Q: Could I stop you right there. Who is they? A: Oh, some people in Hardin. I think the Rod and Gun Club people.

Q: And that was the first time that the pheasant was introduced to the area, too; is that correct? A: Yes.

Q: Do you have any knowledge to the meleheris turkey, where it came from or if it exists now within the exterior boundaries of the Crow Reservation? A: They were planted about 15 years ago in the Ashland Forest area.

Q: Do you have knowledge who planted these birds? A: No, I don't.

Q: Do they exist now on the Crow Indian Reservation? A: There are some in the Wolf Mountains, Wyola area.

Q: How about the hungarian partridge, were they planted on the reservation? A: Whether they were actually planted or not, they are in there, a few of them.

Q: They are not native to the area; is that correct? A: No.

Q: Do you have any idea who planted the rainbow and brown trout and, again, I am speaking of the geographic area within the confines of the present reservation? A: I can guess

Q: I don't want you to guess. Do you know historically? A: Well, the United States Fish and Wildlife has been planting fish in there for a long, long time, and they still do it today.

Q: You don't know if they were the ones that first introduced the brown and rainbow? A: No.

Q: Mr. Medicine Crow, did you ever make the statement in regard to the law and order regulations on the Crow Reservation in regard to comparing the 1904 Regulations and the 1936 Law and Order Code, "That the unique thing about this setup is its close relationship with the state jurisdiction, concurrent rather than exclusive. This means that both the Federal or State courts have jurisdiction over the same offenses enumerated for the Indian courts. The important thing as far as the Crows are concerned is that a definite and complete legal system has been established with the court as the nucleus." Do you recognize those words? A: Yes, sir.

Q: Those words are also contained in your thesis of 1939; is that correct? A: That and probably some other writings, yes.

Q: You also had a discussion with Mr. Roth in regard to individual lands. Are you allotted, Mr. Medicine Crow? A: Yes, sir.

Q: Have you, on occasion, given non-members of the Tribe permission to hunt upon your individual allotment? A: Yes, I let them hunt pheasants. Not fish.

MR. SEYKORA: No further questions.

THE COURT: Any further questions? Any redirect?

MR. SCHOPPERT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHOPPERT:

Q: When the Tribe adopted its Constitution and By-laws in 1948, hadn't the period of time for acting under the Wheeler-Howard Act passed?

MR. ROTH: Object to that as leading the witness, Your Honor.

THE COURT: I don't know how else you would ask it.

MR. ROTH: Ask him a direct question if he knows it, first of all.

THE COURT: All right. Ask the direct question.

BY MR. SCHOPPERT:

Q: Do you know if the time had passed by 1948 to enact a constitution and by-laws under the Indian Reorganization Act? A: The Indian Reorganization Act was enacted into law in 1934 and the Crow Constitution and By-laws adopted in 1948.

Q: When you adopted the Constitution and By-laws, you weren't acting under the Indian Reorganization Act, were you? A: No, sir.

Q: Mr. Roth has brought forth a statement that you made in a Master's thesis. Can you give the Court some background on that particular statement as to why you made it? A: As to creeks teeming with fish?

Q: Yes. A: And the Indians let them be because fishing is a dull way of making a living?

Q: Yes. A: Yes, I remember making that. And I so by way of extolling the virtue of the Crow country and that they do not go into commercial fishing or depend on fishing for their livelihood.

Q: You made a statement in the taken area of the Yellowtail Dam, that the Crows were given the right to hunt and fish in that area. You made that statement to Mr. Roth, did you not? A: Yes, I recall a provision in negotiations which would allow the continued fishing and hunting by the members of the Crow Tribe within a taking area.

Q: Weren't they reserving that right?

MR. ROTH: Objected to as being contrary to the expressed language of the statute or joint resolution.

THE COURT: That will speak for itself.

MR. SCHOPPERT: I have no further questions.

THE COURT: Mr. Medicine Crow, you may step down.

Call your next witness.

MR. SCHOPPERT: Yes, Mr. Henry Hank Old Coyote, please

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TESTIMONY OF
HENRY OLD COYOTE,

DIRECT EXAMINATION

BY MR. SCHOPPERT:

Q: Will you please state your full name for the record? A: Henry Old Coyote.

Q: May I call you Hank? A: You may. Everybody else calls me that and something else, too.

Q: Where do you reside? A: At the present time I came from Ft. Smith, Montana. I have been in the employ of the Senate Select Committe on Indian Affairs, Washington, D.C.

Q: How long have you been employed by that particular committee? A: About 16 months.

Q: And you are not testifying today under the official capacity of that committee? A: I am only testifying as a member of the Crow Tribe.

Q: That was my next question. You are an enrolled member of the Crow Tribe? A: I am.

Q: And can speak Crow, I understand? A: Crow

was my first language. English language is foreign to me.

Q: And you still consider Crow to be your first language; is that correct? A: Correct.

Q: Hank, I show to you what has been marked Crow Tribal Exhibit 75. It is the exhibit we took the deposition on yesterday. A: Yes, sir. I recognize that. I didn't actually write it, but I told the story and Helen Peterson wrote it and I edited it.

Q: And you edited it. If I was — this is for foundational questions. Could you recite the story off the top of your head, if I was to ask you and if we had time here this afternoon to do such? A: Yes, I will recite it, beause I didn't read about it, I heard it from my grandfather. I also heard it from other sources, too, and I have heard it ever since I was a boy. So it was passed along to me orally and I am passing it on to the younger generation orally, too, and the story that you are referring to is referred to as Big Metal.

Q: I take it your great-grandfather was a gentleman named Old Coyote. A: Yes.

Q: Who was your father? A: My father was Barney Old Coyote, Senior.

Q: When were you born? A: I was born — shall I tell you — let's do it our society, March 14, 1914.

Q: Did you have the occasion to have this story related to you by Old Coyote? A: Yes, I was very fortunate to come in contact with him, and I was exposed to his methods of passing information on to the younger generation.

Q: Can you briefly explain for the Court how oral traditions are kept in the first place and how they are passed on? A: Usually it might be the grandfather or the grandparents, you can't limit it to the

grandfather alone, because there are times that the grandmothers will transmit a story orally to either the oldest of the boys or the oldest of the girls, so they would pass it on to the younger members of the family.

Q: But you had an older sister, is that not correct? A: Right.

Q: But you were given this particular story? A: Yes.

Q: Are you the present keeper of this story? A: You might say that because I was the recipient of certain instructions from my grandparents.

Q: About how old were you when you received this particular story from Old Coyote? A: Ever since I can remember until I was about 18 years old when my grandfather passed away.

Q: Would there have been other gentlemen of the Tribe that would have also related this story to you? A: That is correct.

Q: Can you name them? A: I have heard from Shot in the Hand, who was one of the oldest members of the Tribe at the time, pretty close to 100 years old. He had a sharp mind and he recited the story for me. Also from Iron Prong, another older member of the Tribe, as well as others that I came in contact with later on.

Q: For a minute let's place Old Coyote in history. About when was he alive? A: Well, I don't know the year that he was born, but he was alive at the time the Crows were up around the area of Livingston, Three Forks, in that area and they moved down here. And he was alive at the time of the Battle of Rosebud and Custer Battle.

Q: Was he a scout for Custer? A: He was an enlisted man under General Crooke. He was wounded at the Battle of Rosebud. So he wasn't in on General

Custer's Battle.

Q: Can you wait a minute. I will get you a drink of water.

Did you ever have the occasion to discuss either hunting or fishing with Old Coyote or any of the other elderly gentlemen you have discussed or you have mentioned? A: Yes. I wanted to know how they fished or how they obtained fish and what role fish played in the lives of the Crow Indian.

Q: What role did fishing play in the lives of the Crow Indian? A: They supplemented their supplies by having fish, or if they came to a place where there were fish, they had methods of catching them and probably some outstanding young man would probably invite some other members of the Tribe to a feast on a fish that they would catch.

Q: Did they tell you how they caught the fish, Hank?

MR. ROTH: Your Honor—

THE WITNESS: May I explain?

MR. ROTH: Excuse me, Mr. Old Coyote. I haven't interrupted before because I thought he was on foundation. He went — at any rate I do have an objection and continuing objection to the line of questioning upon the grounds and for the reasons, number one, improper foundation; two, trustworthiness not established; number three, obviously hearsay; number four, it is a story in many instances, and with regard to fishing and that sort of thing, there are historical documents now that the Court has received in evidence that do treat the subject. Apparently it isn't alien to literature and therefore, those types of sources should be utilized rather than the hearsay testimony of this witness.

MR. SCHOPPERT: May I ask Mr. Old Coyote just one question before you respond, Your Honor?

THE COURT: Certainly.

BY MR. SCHOPPERT:

Q: Hank, you have heard what Mr. Roth has stated. Is that entirely accurate, the people who have written about the Crows, have they been totally accurate? A: No.

MR. SCHOPPERT: I would like to develop this foundation a little bit more.

BY MR. SCHOPPERT:

Q: Have you not done some consulting work for the National Park Service? A: Right.

Q: Have you done some consulting work for the movie industry? A: Right.

Q: And can you name the movie industry programs that you did consulting work for? A: I was consultant for some documentary films being filmed by N.B.C. and for Paramount.

Q: Have you ever done any — have you ever given any speeches on any college campuses? A: Yes.

Q: Where? A: I have appeared as Guest Lecturer at Eastern Montana College, Montana State University, University of Montana, Northern Montana College, Northern Wyoming College, Northern Arizona College, and a few small schools.

Q: And your speeches were on aspects of Crow life, I take it? A: Correct. Plains Indian culture.

Q: Have you ever discussed Crow history with other white historians that have come through the Indian country? A: Correct.

Q: How about anthropologists? A: I have had my fill with anthropologists, barring Joe Medicine Crow.

Q: Have you ever disagreed with any of the non-Indian anthropologists that have made conclusions about the Crow Tribe? A: Correct. One of the foremost authorities in archaeology, Dr. Shumaker,

came up to Big Horn Canyon National Recreation area and I disagreed with him. I told him what he read was theories, but the story that was passed along to me compared with history, his story was inaccurate.

Q: Old Coyote and these other men that you have mentioned, they would have been alive in the 1870's would they not? A: Yes.

Q: 1880's? A: Yes.

Q: And 1890's, in that era. Under what circumstances would they relate these stories to you as a young — well, as a teenager, older teenager? A: Well, these keeper of certain information are relied upon. My grandfather was such a person, and people wanting to get information from a good source, that they always come to my grandfather.

Q: The truthfulness of Mr. Old Coyote has been attacked by the State of Montana. You were talking in deposition —

MR. ROTH: Just a minute. Excuse me, Your Honor. The honesty and the truthfulness of Mr. Old Coyote, the witness here, or any of his predecessors or ancestors, has not been attacked. That is not the truth.

The truthworthiness of a story is attacked because I believe, as Your Honor knows, myth — something starts out as an incident in some sort of tribal history, such as the earth was created in seven days, and we know that isn't a fact. There is a story in the Crow history that grew out of probably some incident, but because that story passed from word of mouth, from one generation to another, and I believe this witness is going to testify that that story has been carried on some 15 generations, or approximately 300 years, that there creeps into that story a distortion, and a myth, and a fiction, so that

no longer is the Court looking at fact, they are looking at a story. And it doesn't have any probative value or any relevancy in this case and it is on that basis that I attack the trustworthiness, certainly not the honesty of Mr. Coyote, and I resent that remark.

MR. SCHOPPERT: It does create certain areas on the Crow Reservation that have religious significance and that is precisely why this document is going to be introduced.

THE COURT: You are going to offer it?

MR. SCHOPPERT: Yes.

MR. ROTH: Could I supplement my objection with a citation?

Rule 401 in defining relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Now, I submit that a reading of a story just doesn't fulfill that particular requirement.

THE COURT: I haven't looked at the story.

MR. SCHOPPERT: Well, Your Honor, Rule 803(20) can establish Mr. Old Coyote as credible evidence as to establishing this particular story in order to establish the Crow Mountain area which would include both, I believe, the Pryor Mountains and the Big Horn Mountains, plus Big Horn Canyon, as having religious significance to the Tribe.

Now, I think the distance in the Chocteau case puts some reliance on the fact that Chocteaus did not speak about the Arkansas River in some other religious or Indian-held beliefs. I may be slightly misstating the paragraph, but I believe it is the fourth-last paragraph in the dissent, and I believe I have the opportunity to establish for the Court's use, and

of course it is a non-jury trial, the religious significance of those areas to the Crow Tribe and other areas on the reservation as having religious significance.

THE COURT: Well, to shorten up the proceedings at this point, I am going to accept this evidence on the same basis as I did the prior witness's testimony. It is part of the Crow history. I understand from my own personal life that stories change from time to time as things happen, and I am sure it happens with Mr. Old Coyote.

But it is something I believe is part of the Indian culture, and certainly might be helpful to the Court in deciding this case. And for that reason I will allow Mr. Old Coyote to testify.

MR. SCHOPPERT: Thank you, Your Honor.

BY MR. SCHOPPERT:

Q: What this means, Hank, is the story that you have had prepared for you, you related to Mrs. Peterson, will be put into evidence. That means we don't have to recite the entire story. I think the story sort of speaks for itself, and we do want to get the trial on.

I am going to ask you a few generalized questions about the Big Horn Mountain area and what some of the Crow leaders have said about that area.

Hank, have any Crow Tribal leaders, to your knowledge, ever made any statements as to the importancve of the Big Horn Mountains? A: Yes. Going back, I will refer to a statement made by Curly, one of the surviving scouts of General Custer. I saw him and knew him as a boy, and he said that in order to get to the real soil on the Big Horn Mountains or any part of the Indian country, you would have to scratch the surface to get to the real soil

because the top soil is the sweat and blood of the Crow Tribe.

Also, I heard from Chief Two Leggins as a boy. I heard him talking. He said the mountain area, as well as the Crow country, is our commissary, that is where we get our food, like roots, plants, the fruit, and the game on that land. And it is also our place of worship because we go there, the high mountains, the low places, any place on them where we go to meditate, and that results in our religious beliiefs.

That is also a cemetery where our ancestors are mixed in with the soil and it is a place to be enjoyed by our people. We have water on it, which is good, the mountain area is good. We have wildlife on there, which is good. We show our appreciation by using it, going from the known to the unknown. That is our belief.

Q: Do Crow people in 1978, and I feel embarrassed in asking this question, Hank, but I think we have to have it on the record, do Crow people still worship in the Big Horn Mountains presently? A: That is correct. There are some sites that the dominate society has called Vision Quest. That would be the wrong name for it.

Q: What would be the proper name? A: I would call it meditation sites, where people go to pray, where they want to be alone. But the tourist type have come in there and have made those places unclean by leaving their garbage there and the Indians have gone to other places, higher places.

Q: The Big Metal that you refer to in your story, is he buried by the Bighorn River? A: Yes, he is buried — at his request he was buried on the banks of the Bighorn River.

Q: Can you state the location of that? A: It is about a mile from the present post office. But we

were reluctant to tell the public about it, because the last park service had ffered to go in there and make some test holes to look for that grave. But we would be disturbing the remains of Big Metal. That is the reason we haven't told the exact location of that burial site.

Q: I don't want you to go any further on that. When we talk of the mountain areas, are we including the Pryor Mountains and the Big Horns or just the Big Horns? A: We are talking about the Pryor Mountains, too. We have some history that the gentleman over there objected to, but we have sites over there that we know the stories of. But at this point it brings to mind that the dominant society, if it is not written, they don't want to go for it. But as long as they don't get the information from the right sources, they have their own versions of it, and that is what they want to go by. And being illiterate, by not being able to speak their language, they think that person by not being able to speak their language, that they are illiterate.

Q: I want to return now to some of the questions — I think we were on a line of questioning before Mr. Roth posed his objection. We were on the line of questioning that I believe that asked about Old Coyote fishing experiences and you had related facts about fishing. Did he ever tell you what methods they used? I think that was the question I was on. A: Yes. You have the so-called sportsman. In order to be a sportsman, you have to wear a souchy hat and wear fish hooks in your hat and—

THE COURT: The question was how did they fish in those days.

THE WITNESS: Yes, I am just working on the comparison.

THE COURT: I know the comparison. Just answer the question.

THE WITNESS: Now, the Indians had their own methods. They made hooks out of bones. And they used sinew and the methods that were used, it is descriptive. The way they described fishing is snaring a fish and they used to use sinew and they used to take vines, form a little hoop, put the sinew on the side and put it on the end of the willow and snare the fish, and they usually make traps, too. They make spears out of three-pronged willows, put bones on the end of it, and tie it with sinew and use it to spear fish with.

In fact, one man used that method and he was good at it, that he formed the name and passed it on to Earl Howe, give him the name of Spear a Fish.

There is another method, it was our trade secret, but we will tell you now. Young boys used to go down along the river or any stream and look for holes under the banks and big fish usually go in there and rest and they put brush in front of that entrance, reach in there and grab the fish by the gills and throw him out just like a bear would.

BY MR. SCHOPPERT:

Q: Did you ever have the opportunity, Hank, to test any of those methods yourself when you were a young boy?

A: I tried snaring fish.

Q: Were you very successful? A: Yes. In fact one whole summer that is what we did.

Q: Did the Crows, for ceremonial purposes, ever use anything out of the bed of the Bighorn River? A: Yes.

Q: What was that? A: They find seashells, sometimes rocks. The rocks that they get they use

for sweat fath. Sometimes they would get driftwood and use it on their fires. And they find seashell. They use it for remedies for sores or any breaks in the skin or a rash.

Q: Ornaments may be the wrong term — A: Right.

Q: —but would they also use the shells for ornaments? A: A lot of people, they ususally go for these shells and use it for ornaments, but lately abalone shell has been outlawed as an indigenous species. That is the reason I didn't want to come to that. Because we may be saying something here—

Q: You use another type of shell? A: Yes.

Q: Were you present — Mr. Medicine Crow has testified — were you present when the reservation was stocked with buffalo personally? A: Yes.

Q: Can you relate that particular experience? A: Well, I knew they had a surplus herd within the park service areas and other areas. Rather than slaughter the buffalo they were looking for a place to transplant the buffalo. Robert Yellowtail, Senior, happened to be the superintendent at the Crow Agency at the time, and he applied for it and he was given the buffalo and they were transported in trucks and turned loose up into the Big Horn Mountains.

Q: How about elk, did Mr. Yellowtail also participate in an elk stocking program? A: Yes, he also applied for some elk and they turned elk into the Big Horn Mountains.

MR. SCHOPPERT: No further questions, Your Honor.

THE COURT: You are moving the admission of 75.

MR. SCHOPPERT: Yes.

THE COURT: There is objection, which has been noted, and the Court will admit it over objection.

('Whereupon, Crow Tribal Exhibit No. 75 was received in evidence.)

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. ROTH:

Q: Mr. Old Coyote, I have only a very few questions. You and I discussed basically your story during the deposition; isn't that true? A: Well, I will answer your questions as long as I understand them.

Q: Did you understand that? A: When you talk to me the language I understand, I will answer you.

Q: Do you understand me? A: Now, I do.

Q: We discussed your story that appears in Crow Tribal Exhibit No. 75 yesterday at your deposition; is that true? A: Yes, I repeated it at your request.

Q: Now,— A: I didn't know that you didn't believe it.

Q: I beg your pardon? A: I didn't know that you didn't believe it.

Q: I am not saying whether I believe it or not. A: I was trusting you.

Q: What I am going to ask you now, and I don't wish to argue with you nor do I mean to be impolite, Mr. Old Coyote, but if you would just listen to my question and refrain from interrupting until I am finished, I am sure the Court will give you a chance to answer my questions. Is that a deal?

MR. SCHOPPERT: May I approach the bench, Your Honor?

THE COURT: Yes.

(At the bench.)

MR. SCHOPPERT: I think Mr. Old Coyote is upset about the truthfulness of his grandfather. Could

we take just five minutes and could I talk to him? I think he feels that way and can I explain to him what is going to transpire?

THE COURT: Certainly.

(Open court.)

THE COURT: Take a five minute recess.

(Recess)

CROSS-EXAMINATION (Continued)

BY MR. ROTH:

Q: Mr. Old Coyote, Exhibit No. 75, which is the story which apparently was written by Helen Peterson but edited by you, I believe we went over this, basically is the same narrative that you told me at the deposition; is that true? A: Correct.

Q: Now, with regard to that story, is it not true that the event that is related in that story supposedly took place approximately 15 generations ago, or 300 years? A: When you are talking about the measure of time differing from the dominant society, whatever I say might not be what you are thinking. But the story I heard, they place it at 15, at the time going on 16.

Q: So would a generation by your or Indian computation of time be approximately 20 years? A: I don't know. You might say 20, 30, 40 years. But on the average, I would say about 30.

Q: About 30 years? A: Yes.

Q: And thus this event, if we place it in a time context that you do, would have occurred perhaps 450 years ago? A: More or less.

Q: Now, in connection with that event, was there a cairn of rocks that was attributed to that event which is south of the present location of Yellowtail Dam?A: No. Not the present location of Yellowtail

Dam. Yellowtail Dam is about ten to fourteen miles away.

Q: That is what I said. The location of the cairn of rock — I am sory, I think I confused you in the way I worded my question. A cairn of rocks is approximately ten to fourteen, or was ten to fourteen miles south of the present location of Yellowtail Dam; is that correct? A: Right.

Q: Now, as a matter of fact, that cairn of rocks was subject to carbon data analysis by an archaeologist? A: Not the cairn itself, but the sites near that site were tested.

Q: And they dated the carbon dating process, put it at 800 to 1200 years? A: That was approximation, but just like — I am just like you, Mr. Roth, I couldn't go for that.

Q: At any rate, are you familiar with Mr. Medicine Crow's study of history of the Crow Tribal migration from Canada into the United States? A: Yes.

Q: And he has placed that migration into the present location of the Crow country at approximately the year 1700. Does that agree or disagree with you? A: It's possible.

Q: It's possible. You don't necessarily disagree with that, do you? A: I don't disagree with it and I don't agree with it because I have no way of proving it.

Q: Mr. Medicine Crow does hold a particular position in the Tribe, does he not? A: I know he is recognized as an anthropologist.

Q: Is he also the Tribal Historian? A: Yes, he was recognized as such.

Q: As a matter of fact, he was appointed to that position in 1951, wasn't he? A: Correct.

Q: Now, from what you have told me, this story

was in existence in 1887, wasn't it? A: What story are you talking about?

Q: The one that is related in Plaintiff's Exhibit — Crow Tribal Exhibit 75. A: Please, Mr. Roth, please explain something to me. I thought this was disregarded. Was it excluded?

Q: No, the Court has admitted it. And I am shortening my question to refer to that exhibit. A: I am sorry. I misunderstood. Let's start all over again. I have it right here. Let's start all over again.

Q: Was that story in existence in 1887? A: I imagine it was in existence before that time because they have been telling it from time to time up until I hear it.

Q: Now, with regard to the tribal land — strike that, please. With regard to the land of the sacred burial site, is that located — which is apparently a mile from Saint Xavier. Are you following me? A: Yes.

Q: Is that burial ground located on allotted land? A: Yes, I would say it is.

Q: And insofar as you know, was that land allotted pursuant to the Crow Allotment Act of 1920? A: Rephrase that again.

Q: Do you know whether or not the burial ground was allotted under the general Allotment Act of 1887 or whether or not it was allotted under the Crow Allotment Act of 1920? A: That I don't know, but I do know that Indian people own it.

Q: At any rate, it has been allotted whether it was under — A: Correct.

Q: —1887 Act or 1920 Act; is that correct? As I understand your testimony, the mountain areas have always been considered "good" areas, areas for fasting and areas of religious worship; is that correct? A: Correct.

Q: Do you know if this was probably the reason why approximately 400,000 acres of mountain area was reserved for tribal use under the Crow Allotment Act of 1920? A: I didn't know what the reason was, but there was a lot of respect for that area.

Q: Probably based upon your— A: Yes.

Q: —Knowledge of the tribal history, that was probably the reason; is that not true? A: It could be.

Q: Because of the particular religious significance of that particular area, correct? A: Yes, because a lot of those areas up there are respected by my people.

Q: With regard to—well, I guess that is beyond the scope.

MR. ROTH: No further questions with regard to the direct examination, Your Honor.

MR. SEYKORA: I have none, Your Honor.

MR. FREEMAN: I have none, Your Honor.

MR. SCHOPPERT: No redirect, Your Honor.

THE COURT: Thank you, Mr. Old Coyote, you may step down.

Would you call your next witness?

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable James F. Battin, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the title to the bed and banks of the Big Horn River to the high water mark is quieted in the State of Montana, and was so granted upon the State's admission to the Union.

IT IS FURTHER ORDERED and ADJUDGED that the State of Montana has exclusive jurisdiction to regulate non-Indian hunting and fishing activities on the Big Horn River and all patented land owned by non-Indians within the exterior boundaries of the Crow Indian Reservation.

IT IS FURTHER ORDERED and ADJUDGED that the State of Montana has concurrent jurisdiction with the United States to regulate non-Indian hunting and fishing activities on tribal or Indian lands if such activities are in violation of state law. The concurrent jurisdiction of the United States to so regulate non-Indian activities is predicated upon 18 U.S.C. §1165.

IT IS FURTHER ORDERED and ADJUDGED that the Crow Indian Tribe's exclusive rights of hunting and fishing within the exterior boundaries of the Crow Indian Reservation are limited to those lands set forth in 18 U.S.C. §1165.

IT IS FURTHER ORDERED and ADJUDGED that the Crow Indian Tribe has no authority to regulate non-Indian hunting and fishing activities within the exterior boundaries of the Crow Indian Reservation, save in granting permission to non-Indians to trespass on tribal or Indian lands for the purpose of hunting and fishing.

Dated at Billings, Montana, this 1st day of August, 1978.

JOHN E. PEDERSON
Clerk of Court

By:_____
Deputy Clerk